

Americans Abroad: International Educational Programs and Tort Liability

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I. LIABILITY IN PERSPECTIVE

In recent decades, the number of foreign programs operated by American colleges and universities has greatly expanded.¹ Higher education institutions now

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1. According to the Institute of International Education, "[i]n academic year 2003/2004, 191,321 U.S. students studied abroad, an increase of 9.6% from the previous year" and twice as many as a decade earlier. Open Doors: U.S. Study Abroad, <http://opendoors.iienetwork.org/?p=69702>. Study abroad programs span a wide range of disciplines, *see* Open Doors: U.S. Study Abroad, Fields of Study, <http://opendoors.iienetwork.org/?p=71103>, and all parts of the globe, *see* Open Doors: U.S. Study Abroad, Host Regions, <http://opendoors.iienetwork.org/?p=69707>. In New Jersey, for example, "colleges and universities have developed study abroad or exchange options that can place students in more than 50 countries around the world." *The New Student Rush is to Go Overseas*, N.J. REC., Sept. 4, 2005, at T1. "Increasing numbers of American colleges and universities are operating their own programs overseas, rather than merely sending their students to study at overseas universities." John E. Watson, *Practical Risk Management in International Study: Limiting Risks, Crisis Management, and Administrative Practice*, URMIA J. 7, 8 (2002).

The students who participate in study abroad programs are overwhelmingly enrolled at the undergraduate level and roughly two-thirds are female. *See* Open Doors: U.S. Study Abroad, U.S. Student Profile, <http://opendoors.iienetwork.org/?p=69715> (collecting statistics from academic year 1993–94 to academic year 2003–04). However, in some professional fields of education, study abroad is robust. American law schools, for example, now operate ten semester abroad programs and 197 foreign summer programs approved by the American Bar Association. *See* CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION, 2004–2005 ANNUAL REPORT 22 (2005); Lindsay Fortado, *Thinking Globally: Law Schools Expand*

offer a multitude of classes, internships, or study tours conducted wholly or partially outside the United States.² These educational ventures are the most recent incarnations of the rich liberal arts tradition of learning through travel,³ an idea that can be traced back to the days of The Grand Tour, to the work of the scholar Erasmus, and indeed back to the ancient Greeks. Herodotus (484–25 B.C.), “the father of history,” learned about other countries by traveling around most of the known world.⁴ Two thousand years later, Erasmus (1465–1536), “[a]n untiring adversary of dogmatic thought in all fields of human endeavor, . . . lived and worked in several parts of Europe, in quest of the knowledge, experience and insights which only such contacts with other countries could bring.”⁵ Between the sixteenth and nineteenth centuries, it became fashionable for young men and women from well-bred families in England and elsewhere to finish their education by traveling to France and Italy to study art and culture.⁶

Today, study abroad is conducted on a scale that is typically more common and frugal than grand and elite, but it is also more robust than ever before.⁷ The vast majority of American colleges and universities now say that study abroad is a valuable academic option.⁸ Some institutions even treat a foreign educational

International Curricula, NAT'L L.J., Mar. 6, 2006, at 1 (stating that “[n]early all law schools now offer at least one overseas study or ‘study abroad’ opportunity”).

2. See generally William P. Hoye & Gary M. Rhodes, *An Ounce of Prevention is Worth . . . The Life of a Student: Reducing Risk in International Programs*, 27 J.C. & U.L. 151, 153 (2000) (discussing the growth of international programs).

3. “Perhaps travel cannot prevent bigotry, but by demonstrating that all peoples cry, laugh, eat, worry, and die, it can introduce the idea that if we try and understand each other, we may even become friends.” MAYA ANGELOU, *WOULDN'T TAKE NOTHING FOR MY JOURNEY NOW* 12 (1993).

4. See THOMAS CAHILL, *SAILING THE WINE-DARK SEA* 188–89 (2003) (discussing Herodotus's “insatiable curiosity”). See also Herodotus—Who Were the Greek Historians?, <http://ancienthistory.about.com/od/herodotus/p/Herodotus.htm> (last visited Apr. 25, 2006) (discussing Greek historians and Herodotus in particular). Of course, Marco Polo's travels in the late thirteenth century set a high benchmark for what can be learned through travel and disbursed by authorship. “[N]ever before or since has one man given such an immense body of new geographical knowledge to the West.” JOHN LARNER, *MARCO POLO AND THE DISCOVERY OF THE WORLD* 1 (1999).

5. European Union Erasmus Program for Higher Education, http://europa.eu.int/comm/education/programmes/socrates/erasmus/what_en.html (last visited Apr. 25, 2006).

6. “Beginning in the late sixteenth century, it became fashionable for young aristocrats to visit Paris, Venice, Florence, and above all Rome, as the culmination of their classical education. Thus was born the idea of the Grand Tour, a practice which introduced Englishmen, Germans, Scandinavians, and also Americans to the art and culture of France and Italy for the next 300 years.” Metropolitan Museum of Art, *Time Line of Art History: The Grand Tour*, http://www.metmuseum.org/toah/hd/grtr/hd_grtr.htm (last visited Apr. 25, 2006).

7. ARTHUR FROMMER, *ARTHUR FROMMER'S NEW WORLD OF TRAVEL* xiv (5th ed. 1996) (noting that this is “the first generation in human history to fly to other continents as easily as people once boarded a train to the next town, . . . the first generation . . . for whom travel is not restricted to an affluent few”).

8. “Yale College encourages students to spend all or part of their junior year studying in an approved program abroad.” Yale College Programs of Study, Chapter III: Special Arrangements 2005–2006, available at http://www.yale.edu/yalecollege/publications/ycps/chapter_iii/special.html.

experience as an integral and required part of earning a degree.⁹

For reasons ranging from enhanced student recruitment¹⁰ to national security¹¹ and economic competitiveness,¹² there is reason to expect the number and size of foreign educational programs to increase. Indeed, study abroad is now recognized as an important component in promoting American ideals around the globe. As Secretary of State Condoleezza Rice recently remarked, “every American studying abroad is an ambassador for our nation, an individual who represents the true nature of our people and the principles of freedom and democracy for which we stand. . . . [W]e must work together to expand existing programs with proven records of success.”¹³

The proliferation of collegiate international study has been paralleled in American society by heightened concerns—sometimes ill-founded¹⁴—about the risks of tort liability.¹⁵ Thus, it is not surprising that “program providers”¹⁶

9. See Danna Harman, *Harvard (Finally) Gets a Passport*, CHRISTIAN SCI. MONITOR, Mar. 15, 2005, at 14 (discussing “[a] new requirement . . . that every Harvard undergraduate get[] a ‘significant’ overseas experience, be it work, research, or study”); Holli Chmela, *Foreign Detour En Route to a College Degree*, N.Y. TIMES, Oct. 19, 2005, at B9 (stating that in Maryland “[s]tudy abroad has been an option for Goucher College students for 25 years. Beginning next fall, it will be mandatory”). “The Notre Dame Rome Studies Program is the only year-long foreign studies program among American university architecture schools that is required for all its students.” University of Notre Dame School of Architecture’s Year In Rome Program, http://architecture.nd.edu/academic_programs/year_in_rome.shtml (last visited Apr. 25, 2006). The University of Denver has a study abroad requirement for students majoring in International Studies. See University of Denver’s Bachelor of Arts in International Studies Major, <http://www.du.edu/gsis/undergrad/major.html> (last visited Apr. 25, 2006).

10. See Chmela, *supra* note 9 (discussing how study abroad affects college and university recruitment).

11. See Michael Janofsky, *Bush Proposes Broader Language Training*, N.Y. TIMES, Jan. 6, 2006, at A15 (discussing how foreign language training can “play a critical role in national security”).

12. See Steve Ivey, *Study Abroad Seen as Diplomatic Tool*, MONTEREY COUNTY HERALD, Nov. 14, 2005 (stating that “[g]iving more American college students an international education is key to addressing the United States’ increasing security and diplomacy challenges in the Middle East and economic challenges from China and India”).

13. Condoleezza Rice, Secretary of State, Remarks to the U.S. University Presidents Summit on International Education (Jan. 5, 2006).

14. PETER A. BELL & JEFFREY O’CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 188–89 (1997) (discussing how massive campaigns to impugn the tort system influence and distort public perceptions about liability for accidental harm).

15. See PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 12 (1988) (discussing the tort “revolution”), reviewed by Vincent R. Johnson, *Liberating Progress and the Free Market from the Specter of Tort Liability*, 83 NW. U. L. REV. 1026 (1989) (stating that “if Huber is to be believed, the current plague of tort liability has all but idled the engines of progress and stripped the shelves of consumer goods”); see also JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 19 (2004) (discussing the conservative campaign to reshape tort law to reduce the threat of legal liability for harm caused by accidents).

16. This article will use the term “program provider” to encompass the entire range of international education program providers, except when the context calls for more specific terminology. For example, certain rules of law discuss the duties owed by a college or university to its students. See *infra* text accompanying notes 201–03. Those principles may not apply to

(including colleges, universities, consortia, companies, and individuals)¹⁷ have focused increasingly on the threat of being sued for damages based on actions or omissions related to college and university activities generally¹⁸ or to study abroad in particular.¹⁹ Until lately, there were few reported cases involving claims arising from foreign educational ventures.²⁰ However, several recent disputes are now memorialized in court opinions. Students have sued foreign program providers for:

- negligent supervision of medical care provided to a student in Austria;²¹
- breach of fiduciary duty and other torts relating to discrimination based on disabilities in a program which “required participants to spend much of their time exploring the Australian continent;”²²

other forms of program providers.

17. For example, in *Paneno v. Centres for Academic Programmes Abroad Ltd.*, an action arising from injuries sustained by a student in an overseas educational program, there were three defendants. 118 Cal. App. 4th 1447, 1450 (Ct. App. 2004). The first was a California community college which had entered a contract with certain corporate entities relating to its program in Italy. *Id.* at 1453. The second was a U.K. company, which functioned “much like a tour operator in . . . making arrangements with travel suppliers, accommodation suppliers, and other logistical suppliers.” *Id.* at 1450. The third was a California mutual benefit company which was affiliated with the U.K. company and which entered into contracts with California educational institutions, including the defendant community college, and individual California students who wished to participate in study abroad programs. *Id.* at 1452.

18. See Jane A. Dall, Note, *Determining Duty in Collegiate Tort Litigation: Shifting Paradigms of the College-Student Relationship*, 29 J.C. & U.L. 485, 485 (2003) (discussing increased tort litigation against colleges and universities and the “unsatisfying quagmire of case law” faced by administrators charged with developing policies and procedures).

19. See Susan Gilbert, *Study Abroad: Getting Younger*, N.Y. TIMES, Mar. 31, 2002, § 5, at 2 (stating that “[t]here’s an increased concern by students and their parents about safety as a critical component in making a final decision about study abroad” and as a result “the industry has updated its safety and security recommendations to study-abroad-program administrators”); cf. “*Floating University*” Will Move to U.Va., RICHMOND TIMES DISPATCH (Va.), Dec. 21, 2005, at K2 (discussing plans to move a cruise ship study program to the University of Virginia after the prior sponsor, the University of Pittsburgh, expressed concerns about the ship’s safety following a 2005 accident).

20. See William P. Hoyer, Comment, *The Legal Liability Risk Associated with International Study Abroad Programs*, 131 EDUC. L. REP. 7, 8 (Feb. 4, 1999) (noting “few reported court decisions”).

21. *McNeil v. Wagner Coll.*, 667 N.Y.S.2d 397 (App. Div. 1998). See *infra* text accompanying note 221 (discussing the unsuccessful claim).

22. *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015, 1017 (9th Cir. 2002). The student alleged “(1) violation of the [federal Rehabilitation Act], (2) violation of Title III of the [Americans with Disabilities Act], (3) breach of contract, (4) breach of fiduciary duty, (5) defamation, (6) negligence, (7) fraud, (8) negligent misrepresentation, and (9) intentional infliction of emotional distress.” *Id.* at 1019. The Ninth Circuit found that “[a]ll of the claims essentially share[d] one premise: during Bird’s stay in Australia, the College discriminated against her on the basis of disability by failing to provide her with wheelchair access.” *Id.* The trial court had granted summary judgment for the college on the defamation and intentional infliction of emotional distress claims. *Id.* “The jury found against [the student] on all but the breach of fiduciary duty claim for which it awarded her \$5,000.” *Id.* The Ninth Circuit affirmed. *Id.* at 1023. See *infra* text accompanying notes 248–252 (discussing *Bird*).

- negligence relating to injuries sustained by a student when he fell from an apartment house balcony where he resided while participating in a program in Italy;²³
- “abandoning” an American female student at a Peruvian clinic where male doctors performed unnecessary surgery and took sexual liberties with her;²⁴ and
- negligence pertaining to sexual-assault injuries sustained by a student in a cultural immersion program in Mexico.²⁵

There was another reported case in which women alleged indifference on the part of the administrators of a study abroad program in South Africa to their complaints of abuse.²⁶ Such a claim may, alternatively, have been brought for intentional infliction of emotional distress. Courts have occasionally held that failure to respond appropriately to allegations of discriminatory treatment may constitute extreme and outrageous conduct that can support a tort action for damages.²⁷

23. *Paneno v. Centres for Academic Programmes Abroad Ltd.*, 13 Cal. Rptr. 3d 759, 761 n.1, 766 (Ct. App. 2004) (indicating that a student who was injured in a six-story fall from a residential balcony while participating in an overseas educational program stipulated to the dismissal of his claim against an American community college but established general jurisdiction over a foreign corporation which had arranged the accommodations).

24. *Fay v. Thiel Coll.*, 55 Pa. D. & C.4th 353, 367 (Ct. Com. Pl. 2001) (holding that an exculpatory clause contained in the waiver of liability form signed by the student was not valid and that the college owed the plaintiff a special duty of care pursuant to the terms of a consent form the student was required to sign).

25. *Bloss v. Univ. of Minn. Bd. of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999). A student who was raped by a taxi driver “sued the University for negligence in its failure to secure housing closer to the [foreign program] campus, failure to provide transportation to and from campus, failure to adequately warn about risks, and failure to protect students from foreseeable harm.” *Id.* at 663. The appellate court held that the student’s claim failed because the university had demonstrated that it was “entitled to statutory immunity in the exercise of its discretionary decision to create a cultural immersion program that placed students in host homes, relied on available public transportation, and provided a variety of student warnings and information.” *Id.* at 667.

26. *King v. Bd. of Control of E. Mich. Univ.*, 221 F. Supp. 2d 783, 791 (E.D. Mich. 2002) (opining that “[s]tudy abroad programs are an integral part of college education today” and that “[a] denial of equal opportunity in those programs has ramifications on students’ education as a whole and detracts from their overall education”).

27. *See Ford v. Revlon, Inc.*, 734 P.2d 580, 586 (Ariz. 1987) (holding that a corporation’s failure to take appropriate action in response to an employee’s allegation of sexual harassment by a manager constituted intentional infliction of emotional distress). *See also* *Manning v. Metro. Life Ins.*, 127 F.3d 686 (8th Cir. 1997) (holding that whether an employer’s alleged toleration of sexual harassment by a supervisor and coworker constituted the tort of outrage was question for jury). *But see Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004) (holding that a “handful of off-color jokes did not show employer fostered a culture that encouraged extreme and outrageous conduct”); *Martin v. Baer*, 928 F.2d 1067 (11th Cir. 1991) (holding that failure to investigate rumors of sexual harassment was at most a negligent omission); *Ammon v. Baron Auto. Group*, 270 F. Supp. 2d 1293 (D. Kan. 2003) (finding that an alleged lack of response to sexually abusive comments of employees, if proven, was not extreme and outrageous); *Farris v. Bd. of County Comm’rs*, 924 F. Supp. 1041, 1051 (D. Kan. 1996) (stating that failure to investigate alleged harassment was not extreme even though employee had filed EEOC charges).

News reports sometimes discuss incidents of harm to students studying abroad for which there are no reported decisions.²⁸ Because of the tendency of tort cases to be settled, rather than fully tried, the number of unreported cases based on harm to students participating in study abroad programs may be considerably larger than what appears in legal research databases.²⁹ Accidents, including many of a serious nature,³⁰ are probably at least as likely to happen to Americans traveling in other countries as in the United States.³¹

and a complaint with the defendant employer).

28. See, e.g., Gary Rotstein, *Arrest in Seoul Killing: Ex-Marshall Student Confesses to Derry Woman's Beating*, PITTSBURGH POST-GAZETTE, Mar. 2, 2002, at A1 (discussing a student at the University of Pittsburgh who was found "naked and beaten to death in her room" while traveling on a break from studies at Kiemyung University in Korea).

29. Cf. Watson, *supra* note 1, at 7 (describing briefly four incidents).

30. Respondent's Brief at 6, *Paneno v. Centres for Academic Programmes Abroad Ltd.*, 13 Cal. Rptr. 3d 759 (Ct. App. 2004) (No. B162753) (describing a fall resulting in paralysis).

31. But see Watson, *supra* note 1, at 7 (stating that "[g]iven the numbers of students on American college campuses who die each year from noncriminal activity such as auto accidents, or who are assaulted or robbed on their home campus, it is arguable that students are statistically safer overseas than they are in the United States"). It is difficult to prove whether or not accidents are more likely to occur in the United States or abroad. American criminologists, for example, find it hard to "provide precise data on the number of American victimizations abroad." Daniel B. Kennedy & Jason R. Sakis, *Tourist Industry Liability for Crimes Against International Travelers*, 22 TRIAL LAW. 301, 302 (1999). However, one might reason circumstantially. Auto accidents are more common in many countries than they are in the United States. According to the U.S. State Department, "[a]n estimated 1.17 million deaths occur each year worldwide due to road accidents. The majority of these deaths, about 70 percent, occur in developing countries." U.S. Dep't of State, Road Safety Overseas, http://travel.state.gov/travel/tips/safety/safety_1179.html (last visited Apr. 25, 2006). Some studies have ranked the United States among the ten safest countries for road travel. See Victoria Griffith, *The Road to Trouble*, FIN. TIMES, May 13, 1996, available at <http://www.asirt.org/Publications/financialtimes.htm> (discussing a study by the Association for Safe International Travel). Also, safety may correlate with economic development and technology. Some persons argue that "newer is generally safer than older in the modern technological world." HUBER, *supra* note 15, at 160. One might therefore suggest that countries with access to the most modern technologies are safer than those that are less developed. But other persons vigorously dispute the underlying proposition about the correlation between modern technology and safety. As one author wrote:

The industrial revolution brought with it an unprecedented holocaust of workplace injuries and accidents: severed limbs, scalded faces, mine cave-ins, brown lung disease, and so on. In the twentieth century these workplace hazards have been supplemented by . . . exposure to hundreds of toxic chemicals Outside the workplace we face acid rain, the carnage of automobile accidents, the creeping poison of toxic dumps, and the unquantifiable peril of nuclear waste and nuclear accident.

Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 543 (1990). The fact that life expectancy is longer in the United States than in many other countries may also be some indication that life in the United States is safer. See James W. Shaw, William C. Horrace & Ronald J. Vogel, *The Determinants of Life Expectancy: An Analysis of the OECD Health Data*, 74 S. ECON. J. 768 (Apr. 1, 2005) (discussing that the "general consensus is that population life expectancy (or mortality) is a function" of several variables, including safety).

Presumably, the answer to whether life abroad is safer than life in the United States turns upon the type of harm at issue. My personal opinion, based on six trips to China during the past decade, is that in China there is a reduced risk of *criminal* harm (perhaps as a result of traditional Chinese respect for foreign visitors) and a greatly enhanced risk of *accidental* harm (resulting

It is important to consider carefully the risks and limits of potential liability in international education programs. Overstating the risk of being sued threatens to divert limited resources from the educational components of study abroad to an illusory quest for risk-free education. However, understating the threat of liability not only makes it more likely that a program provider will be mired in claims for damages, it also squanders valuable opportunities for achieving an optimal level of safety in foreign educational ventures.³² “Resources are scarce, and so it would be wasteful either to devote too many of those resources to accident prevention or to devote too little to accident prevention.”³³ Consequently, “[p]roper deterrence requires making those who contemplate dangerous conduct liable for all of the increased harm that occurs whenever that dangerous conduct is undertaken. Making actors liable for more than that over-deters.”³⁴

In managing the risks associated with operation of an international education venture, it may be useful for program providers to distinguish between risks that are inherent in any study abroad program (e.g., risks relating to the condition of the program’s facilities) and special risks that are not a necessary part of study abroad (e.g., risks relating to non-educational activities, such as bungee jumping and other forms of recreation). A program provider has no choice but to devote attention and resources to managing inherent risks. Special risks that are not an integral part of the education program can be addressed by dropping those activities from the foreign program and neither sponsoring nor recommending them as outside activities.

The objective of focusing on safety concerns related to study abroad is not to

from all sorts of preventable dangers, such a multitudinous missing man-hole covers in major cities, unlighted stairways, and egregiously bad driving practices). Such dangers of accidental harm give rise to substantial liability in the United States. See *\$16M Award for Woman Injured in Manhole Fall*, NAT’L L.J., Mar. 27, 2006, at 15. Therefore, precautions often are taken in this country to avoid such dangers.

Of course, it makes all the difference where one is traveling. New Zealand is not the Balkans. See John Henzell, *New Zealand Voted Safest, Not Most Boring Travel Destination*, PRESS (N.Z.), Feb. 23, 2005, at 13 (discussing a poll by *Wanderlust*, a British travel magazine). American students participating in a foreign educational program operated in Austria or Germany might legitimately feel an enhanced level of personal security (as a result of cultural norms and state-of-the-art technology). In contrast, American students studying in Moldova or Mongolia may encounter many of the risks of accidental and intentional harm that are the natural byproducts of a weak economy. Some of those injuries will inevitably result in tort litigation.

32. See Peter F. Lake, *Private Law Continues to Come to Campus: Rights and Responsibilities Revisited*, 31 J.C. & U.L. 621, 624 (2005) (stating that the “modern college or university now attends to foreseeable risks as a matter of good business, not just for litigation avoidance”).

33. VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 250 (3d ed. 2005).

34. *Id.* at 433. See also Johnson, *supra* note 15, at 1037 (“Over-deterrence occurs where the risk of tort liability prompts persons to spend resources on efforts designed solely to avoid liability (as may be the case where malpractice-wary physicians order unnecessary medical tests) or to abandon fields of endeavor entirely (as is true where doctors refuse to perform obstetric services and companies terminate contraceptive research).”); Dall, *supra* note 18, at 506 (“Excessive imposition of liability not only creates a financial burden but may also cause rational college administrators to reduce programming and to interact differently with students.”).

offer a risk-free foreign experience. That goal is no more desirable than the idea that car manufacturers should produce risk-free vehicles so crash-worthy and slow that no one could ever be harmed in an auto-accident and no suit ever filed. Education inevitably entails risks,³⁵ particularly when it takes place in another country. Exposing students to some of those risks is part of the educational process. Allowing students to become immersed in a foreign culture, rather than sheltered within the confines of an Americanized foreign educational outpost, helps them to understand how other people live and why those people do what they do.³⁶ Cultural immersion also helps students to see that the choices that define the fabric of foreign economic cultures and foreign legal systems produce different levels of affluence, citizen empowerment, and consumer protection. Americans need to appreciate, both through experience and intellect, that only a fraction of the world enjoys the level of prosperity, political freedom, and general safety that now prevail in the United States.

American program providers should not operate super-cautious foreign programs,³⁷ excessively concerned with imposing American practices on life in foreign cultures. "The key objective [of travel] is to experience events, lifestyles, attitudes, cultures, political outlooks, and theological views utterly different from what you encounter at home."³⁸ Thus, American program providers should not strive to make a foreign educational experience the same as studying in the United States, but should simply take reasonable precautions to minimize the foreseeable risks of harm to program participants. One way of doing this is by providing accurate information to students and their families that allow them to make an informed choice about whether a program entails an acceptable level of risk. Another way of promoting safety is to implement programmatic practices that minimize the probability of unnecessary harm. Yet it is important to remember that "some measures to reduce the costs of accidents are not worth taking, because

35. See Nancy Tribbensee, *Tort Litigation in Higher Education: A Review of Cases Decided in the Year 2001*, 29 J.C. & U.L. 249, 284 (2003) (stating that "[s]ome level of risk is inherent in teaching, learning, and managing the daily operations of a college or university," but that many tort claims can be avoided).

36. See FROMMER, *supra* note 7, at xiv ("To have meaning at all, travel must . . . challenge our preconceptions and most cherished views, cause us to rethink our assumptions, shake us a bit, make us broader-minded and more understanding.").

37. However, some persons advocate what others might think of as unusual or extraordinary steps to plan ahead for contingencies. For example, in his article regarding crisis management for international study, John E. Watson states "[i]t is highly recommended that consideration be given to procuring kidnap and ransom coverage, which is designed to fund not only the economic demands of the perpetrators but to provide the institution direct access to specialists in hostage negotiation and recovery. . . . [O]n-site assessments of [foreign facilities] present the opportunity to discover unique hazards that might otherwise go unrecognized . . . including lack of local fire hydrants, . . . lack of safety glass in doors, . . . [and] uneven pavement." Watson, *supra* note 1, at 9. Watson further states that it is useful to develop personal contacts with "key representatives from the local police and fire agencies." *Id.* at 10.

38. Jonathan T. Weisberg, *Arthur Frommer: The Traveler at Home*, YALE L. REP. Summer 2005, at 47 (quoting Arthur Frommer, the Yale lawyer and entrepreneur who wrote *EUROPE ON 5 DOLLARS A DAY* (1957) and other books that, beginning in the 1950s, revolutionized foreign travel for Americans).

the benefits of added safety would amount to less than the costs.”³⁹

The liability issues relevant to study abroad programs are as broad as the expansive field of torts. To some extent, the claims that will arise in the international education context may be similar to suits involving home campus activities that raise issues relating to premises liability,⁴⁰ intentional or negligent infliction of emotional distress,⁴¹ negligent misrepresentation,⁴² fraud,⁴³ and negligent security.⁴⁴ However, some causes of action related to the unique nature of study abroad may have no precise home campus counterparts, such as suits concerned with the duties owed to students when civil unrest or political violence wracks the host country, when gunmen ambush a bus,⁴⁵ or when dangers arise

39. JOHNSON & GUNN, *supra* note 33, at 251. *See also id.* at 250 (stating, with respect to the Learned Hand negligence formula, that “this is why the law insists that drivers keep to the right on two-way streets, while not bothering to make pedestrians on sidewalks stay in lanes”).

40. *See* Cohen v. Univ. of Dayton, 840 N.E.2d 1144, 1146 (Ohio Ct. App. 2005) (alleging that a university negligently caused the death of one student who died as a result of arson committed by a second student in a university residence); *Manon v. Univ. of Toledo*, No. 2003-09840, 2005 WL 1532916, at *1–2 (Ohio Ct. Cl. June 21, 2005) (holding that a student failed to prove that a university negligently caused a slip-and-fall accident); *Candido v. Univ. of R.I.*, 880 A.2d 853, 857–60 (R.I. 2005) (holding that a university was not liable for negligence where evidence established that the dark area where the plaintiff student fell was not an existing pathway and that student could have used existing pathways rather than his chosen route); *Webb v. Univ. of Utah*, 125 P.3d 906, 912–13 (Utah 2005) (holding that a state university instructor’s directive to students during a field trip to traverse icy sidewalks did not reasonably induce students to rely on the directive such that a student could prevail on a negligence claim against the university for injuries suffered when another person grabbed the student while slipping on the sidewalk).

41. *See* Turner v. Univ. of S.F. Sch. of Nursing, No. C 05-02048 JSW, 2005 WL 3097874, at *4 (N.D. Cal. Nov. 18, 2005) (dismissing claims by a student with learning disabilities for intentional and negligent infliction of emotional distress, but allowing the student to re-plead); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 46–47 (D. Me. 2005) (holding that a university’s finding that two students had committed sexual assault did not constitute intentional infliction of emotional distress, absent a showing that the finding was intentionally false); *Shelton v. Trs. of Columbia Univ.*, No. 04 Civ. 6714(AKH), 2005 WL 2898237, at *2 (S.D.N.Y. Nov. 1, 2005) (holding that a claim for intentional infliction of emotional distress based on expulsion was time barred).

42. *See* *Gomes*, 365 F. Supp. 2d at 47–48 (holding that any failure of a university disciplinary committee’s presiding officer to forward allegedly promised information to the committee did not amount to negligent misrepresentation, absent evidence of justifiable reliance by the plaintiff students).

43. *See* *Harmon v. Sullivan Univ. Sys., Inc.*, No. Civ. A. 03-738-C, 2005 WL 1353752, at *3–6 (W.D. Ky. June 6, 2005) (holding that a student presented sufficient evidence to support claims for fraud and negligent misrepresentation relating to accreditation of the school); *Shelton*, 2005 WL 2898237, at *5 (holding that plaintiff failed to prove fraud based on presentation of allegedly false information at plagiarism hearing).

44. *See* *Shivers v. Univ. of Cincinnati*, No. 2000-02461, 2005 WL 517450, at *4 (Ohio Ct. Cl. Jan. 6, 2005) (holding that a university’s failure to install locks or latches on shower doors constituted a breach of duty of care that caused the student’s injuries); *Kleisch v. Cleveland State Univ.*, No. 2003-08452, 2005 WL 663214, at *3 (Ohio Ct. Cl. Feb. 22, 2005) (holding that a university was not liable for the unforeseeable rape of a student in a classroom).

45. *See* *Hoye*, *supra* note 20, at 10 (discussing an ambush in Guatemala in 1998); *id.* at 11 (discussing an ambush in Ecuador in 1997).

from educational contact with a controversial foreign scholar.⁴⁶

This article will address selected topics relating to the demands that American tort law places on the operation of study abroad programs. However, the discussion will commence by considering three issues which may limit the role that American law or American courts play in resolving tort claims arising in connection with international educational programs, namely the efficacy of contractual provisions specifying choice of law (Part II), choice of arbitration (Part III), or choice of forum (Part IV). These important, but heretofore little discussed, matters may play pivotal roles in determining issues of tort liability.

The remaining sections focus on the principles of American tort law that will guide the resolution of claims that are resolved by reference to the law of an American state (as opposed to the law of another country). Part V discusses the principal theories under which a program provider may be subject to liability (fault, respondeat superior, nondelegable duty, and ostensible agency). Part VI then focuses on negligence claims, exploring in turn the relationship between reasonable care and foreseeability; the contextual nature of reasonable care; the significance of conformance with or departure from customary practices; and liability based on voluntary assumption of a duty that would not otherwise exist. Next, Part VII considers legal responsibility for misrepresentations made in relation to foreign educational programs and breach of fiduciary duty. Part VIII, the conclusion, emphasizes the importance of sound personnel decisions and returns the discussion to its starting point, the need to keep the risk of tort liability in perspective.

II. CHOICE OF LAW

The mere fact that an injury occurs outside the United States does not mean that an American court lacks jurisdiction to adjudicate a claim based on the injury.⁴⁷

46. "Intellectuals and academics whose work threatens established orthodoxy have been persecuted in every age." Inst. of Int'l Educ., *Saving Lives and Ideas: A Brief History of Scholar Rescue*, Jan. 2006, http://www.iie.org/Content/NavigationMenu/Programs7/SRF/Saving_Lives_and_Ideas.htm (last visited Apr. 25, 2006) (discussing the scholar rescue program of the Institute of International Education).

47. See *Arno v. Club Med Inc.*, 22 F.3d 1464 (9th Cir. 1994) (adjudicating tort and contract claims arising from a rape at a resort in France); *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412 (9th Cir. 1989) (adjudicating tort and contract claims arising from events that took place in Saudi Arabia); *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (stating that "[c]ommon law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred"); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) (providing that "[a] state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems").

The usual rules of jurisdiction will apply. A program provider, such as a college or university, may be sued in the state in which it is located, in another state where it has “minimum contacts,”⁴⁸ or in federal court subject to the rules of personal and subject matter jurisdiction.⁴⁹

The principles of tort law applicable to a suit involving an injury occurring outside the United States will ordinarily be determined under choice-of-law rules.⁵⁰ For example, if a student from state A sues a program provider from state B for harm suffered in connection with a program conducted in foreign country C, a court will apply choice-of-law rules to decide whether the tort law of jurisdiction A, B, or C, or perhaps even some other jurisdiction, governs the dispute.⁵¹ The applicable tests for determining choice of law are stated at a high level of generality due to “the great variety of torts . . . and . . . [the] fluidity of the decisions and scholarly writings on choice of law in torts.”⁵² As a result, it is difficult to predict which body of law will apply to a foreign educational program tort claim.

Indeed, the uncertainty is even greater than might first appear. An accident in a study abroad program might affect multiple participants drawn from different parts of the United States or from different countries, and therefore there may be diverse competing interests relevant to the claims of the various injured parties. Moreover, courts have long recognized that they are not bound to decide all issues under the local law of a single state. . . . Each issue is to receive separate consideration if it is one which would be resolved differently under the

48. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”); see also *Antoine v. Syracuse Univ.*, No. CV030473601, 2003 WL 22481407, at *5 (Conn. Super. Ct. Oct. 20, 2003) (dismissing because of the court’s lack of personal jurisdiction over out-of-state university); *Severinsen v. Widener Univ.*, 768 A.2d 200, 206 (N.J. Super. Ct. App. Div. 2001) (holding that an out-of-state university’s recruitment activities in New Jersey were not so systematic, pervasive, and continuous as to support the exercise of personal jurisdiction for purposes of a negligence action brought by a student who was injured in a university dormitory).

49. See *Vilchis v. Miami Univ. of Ohio*, 99 F. App’x 743, 745–46 (7th Cir. 2004) (holding that a university was not subject to jurisdiction in Illinois, even though a coach recruited the plaintiff diver while she lived in Illinois and the swim team traveled to Illinois once, because the university was located in Ohio, the diving team practiced on campus and had a majority of its meets in Ohio, and the injury occurred in Ohio). “Where the jurisdiction of a federal court is premised on diversity, the court has personal jurisdiction over a defendant only if a state court where the district court sits would have personal jurisdiction.” *Id.* at 745 (citing *Hyatt Int’l Corp. v. Coco*, 302 F.3d 707, 713 (7th Cir. 2002)).

50. See, e.g., RESTATEMENT (SECOND) OF CONFLICTS § 145(1) (1971) (stating that “[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence”).

51. Cf. *Arno*, 22 F.3d at 1467 (applying choice-of-law rules and determining that French law governed tort claims arising from a rape at a resort in France); *McGhee*, 871 F.2d at 1422 (holding that Saudi law governed claims for defamation, intentional infliction of emotional distress, fraud, and conversion arising from events that took place in Saudi Arabia).

52. RESTATEMENT (SECOND) OF CONFLICTS § 145 cmt. a (1971).

local law rule of two or more of the potentially interested states.⁵³

A program provider may seek to reduce uncertainties relating to applicable legal principles by specifying in its agreement with program participants that claims will be governed by the law of a particular state. Many colleges and universities already do this. “[P]arties may generally consent to application of American law to govern their relations, as evidenced by a choice of law clause.”⁵⁴ “[R]easonable stipulations of choice of law are honored in contract cases.”⁵⁵ In addition, courts have found that there is no reason why the same principles of deference to party choice should not apply to tort claims,⁵⁶ at least if the choice-of-law clause “embraces all aspects of the legal relationship.”⁵⁷

53. *Id.* § 145 cmt. d.

54. *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 185 (3d Cir. 1995). *See also* *Holloway v. HECI Exploration Co. Employee's Profit Sharing Plan*, 76 B.R. 563, 572 (Bankr. N.D. Tex. 1987) (stating in dicta that “parties can, within broad limits, stipulate the substantive law to be applied to their dispute”); *Muslin v. Freylinghuysen Livestock Managers, Inc.*, 777 F.2d 1230, 1231 n.1 (7th Cir. 1985) (holding that the parties could stipulate to New York law); *Casio, Inc. v. S.M. & R. Co., Inc.*, 755 F.2d 528, 531 (7th Cir. 1985) (stating that “[p]arties can within broad limits stipulate the substantive law to be applied to their dispute”).

55. *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982) (citing RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 355–56 (2d ed. 1980)). *See also* *Von Hundertmark v. Boston Prof'l Hockey Ass'n, Inc.*, No. CV-93-1369 (CPS), 1996 WL 118538, at *4 (E.D.N.Y. Mar. 7, 1996) (stating, with respect to a contractual choice-of-law provision, that under New York law, which provides by statute that “parties may contract, agree, or undertake in advance to apply a certain forum's law . . . there is no express prohibition against parties stipulating as to the choice of law in tort actions”). *But see* *Ezell v. Hayes Oilfield Constr. Co., Inc.*, 693 F.2d 489, 492 n.2 (5th Cir. 1982) (“Louisiana does allow parties to agree *contractually* to what state's law would be applied to resolution of contractual disputes.”); *Swanson v. Image Bank, Inc.*, 77 P.3d 439, 441–42 (Ariz. 2003) (stating that “neither a statute nor a rule of law permitting parties to choose the applicable law confers unfettered freedom to contract at will on this point,” and that when the parties include an express choice of law provision, the court must conduct an “analysis to ascertain the appropriate balance between the parties' circumstances and the states' interests” and thereby determine if the provision is valid and effective).

56. *See Lloyd*, 694 F.2d at 495 (“[W]e do not see why the same principle should not apply in tort cases, though the issue has not to our knowledge arisen in such a case.”). As described in *Twohy v. First National Bank of Chicago*, 758 F.2d 1185, 1190 (7th Cir. 1985):

Lloyd considered whether the Wisconsin courts would recognize a tort of wrongful interference with a child's custody . . . Both parties had stipulated in the district court below that the law of Wisconsin applied to the substantive issues of the case. Plaintiffs, however, urged on appeal that under Wisconsin conflict of laws principles, the law of Maryland should control the “wrongful interference” issue.

Id. at 1190 (citations omitted). *Twohy* found that reasonable stipulations of litigants as to choice of law in tort cases would be honored by Illinois law. *Id.* at 1191.

57. *Jiffy Lube Int'l, Inc. v. Jiffy Lube of Pa., Inc.*, 848 F. Supp. 569, 576 (E.D. Pa. 1994) (stating that “[c]ontractual choice of law provisions . . . do not govern tort claims between contracting parties unless the fair import of the provision embraces all aspects of the legal relationship,” and declining to find that a narrow provision “limited on its face to ‘this agreement’” determined the choice of law for tort claims involving fraud and misrepresentation). *See also* *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 309 (2d Cir. 1994) (finding that a contractual choice-of-law provision covering “any controversy or claim arising out of or relating to this contract or breach thereof” was sufficiently broad to encompass a claim for common law fraud); *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 726 (5th Cir. 2003) (holding

A judicious choice-of-law provision may confer substantial advantages on a program provider. Today, in the United States, tort principles and judicial attitudes are considerably more favorable to plaintiffs in some states than in others. Suppose, for example, that New Mexico tort law tends to be pro-plaintiff⁵⁸ and that Texas tort law tends to be pro-defendant.⁵⁹ A Texas college or university that operates a foreign program which attracts students from New Mexico might benefit from stating, as part of the student-provider contract, that Texas law governs disputes arising in connection with the program.⁶⁰ A court may rely on

that claims for fraud and negligent misrepresentation were not governed by the parties' narrow choice-of-law provision); *Dorsey v. N. Life Ins. Co.*, No. Civ.A. 04-0342, 2005 WL 2036738, at *6 (E.D. La. Aug. 15, 2005) (stating that in the Fifth Circuit narrowly worded "choice of law clauses . . . apply only to contract claims and not to tort claims arising out of the contractual relationship"); *Turtur v. Union Oil Co. of Cal. v. John Brown*, No. 94 C 4424, 1994 WL 535108, at *2 (N.D. Ill. Sept. 30, 1994) (declining to apply a choice-of-law clause to tort claims because "[a]lthough the choice-of-law clause specifies that the contract's terms are to be interpreted and enforced in accordance with California law, neither the choice-of-law clause nor any other language in the contract suggests that the parties also intended tort or other non-contractual claims to be governed by California law").

58. See, e.g., *Lozoya v. Sanchez*, 66 P.3d 948, 954 (N.M. 2003) (holding that although "no other State in the union currently allows unmarried cohabitants to recover for loss of consortium," such a claim may be asserted in New Mexico by an unmarried cohabitant who proves an intimate familial relationship with the victim).

59. For example, "[v]irtually all courts confronting the issue have decided that mental-health professionals owe some affirmative duty to third parties with regard to patients who are recognized as posing dangers." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 41 cmt. g (Proposed Final Draft No. 1, 2005). However, Texas is to the contrary. See *Thapar v. Zezulka*, 994 S.W.2d 635 (Tex. 1999) (holding that a psychiatrist has no duty to warn a victim or the victim's family). As to the conservatism of Texas tort law, see generally Patricia F. Miller, Comment, 2003 *Texas House Bill 4: Unanimous Exemplary Damage Awards and Texas Civil Jury Instructions*, 37 ST. MARY'S L.J. 515, 518-19 (2006) (discussing comprehensive tort reform legislation which was criticized for "reduc[ing] damage awards and severely restrict[ing] certain causes of action" and will potentially create great obstacles for plaintiffs seeking punitive damages); Phil Hardberger, *Juries Under Seige*, 30 ST. MARY'S L.J. 1, 4 (1998) (describing decisions of the conservative Texas Supreme Court during the 1990s); Timothy D. Howell, *So Long "Sweetheart"*—*State Farm Fire & Casualty Co. v. Gandy Swings the Pendulum Further to the Right as the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 52 (1997) ("[N]owhere has [the] modern retreat from a pro-plaintiff atmosphere been more apparent than in Texas.").

60. Anyone who doubts that specifying Texas law would confer a benefit on a defendant may want to survey Texas tort law. Among other things, Texas has largely abolished claims for negligent infliction of emotional distress, see Charles E. Cantu, *An Essay on the Tort of Negligent Infliction of Emotional Distress in Texas: Stop Saying It Does Not Exist*, 33 ST. MARY'S L.J. 455, 465 (2002) (discussing the Texas Supreme Court's retreat from a broad interpretation of the tort), declines to award loss of consortium damages in cases of injury to a child, *Roberts v. Williamson*, 111 S.W.3d 113, 117 (Tex. 2003), rejects social host liability for providers of alcohol, *Beard v. Graff*, 858 S.W.2d 918 (Tex. 1993), broadly construes the no-duty rules relating to obvious dangers, *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706 (Tex. 2003), narrowly applies the doctrine of constructive notice, *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812 (Tex. 2002), restricts application of the *res ipsa loquitur* doctrine, *Trans Am. Holding v. Market-Antiques*, 39 S.W.3d 640 (Tex. App. 2000), and follows the traditional rules on premises liability rather than modern standards that broaden the duties of possessors of land, *Wong v. Tenet Hosps., Ltd.*, 181 S.W.3d 532 (Tex. App. 2005).

that language in resolving choice-of-law issues, as it is customary for the judiciary to defer to decisions made by the parties regarding applicable law, assuming the choice-of-law clause is reasonable.⁶¹ Presumably, the parties must specify the law of a state to which the program provider, the student, or the program has a clear relationship.⁶² In the context of contractual choice-of-law provisions, “[o]rdinarily the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs.”⁶³ Courts sometimes question the validity of boilerplate choice-of-law provisions which have not been specifically bargained for by the parties.⁶⁴ However, reasonable provisions that are part of standard form contracts have often been enforced.⁶⁵

If there are several reasonable choices that might be made in specifying which

61. See *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1218–19 n.6 (7th Cir. 1995) (stating that “[l]itigants can, by stipulation, formal or informal, agree on the substantive law to be applied to their case,” as long as the stipulation is reasonable” (citing *City of Clinton v. Moffitt*, 812 F.2d 341, 341 (7th Cir. 1987))). In *City of Clinton*, the court found that “the parties agree that Illinois contract law governs, and that is all that is necessary to make it govern.” *City of Clinton*, 812 F.2d at 342. Cf. *In re Marriage of Adams*, 551 N.E.2d 635, 638 (Ill. 1990) (holding that a stipulation, applying Illinois law, entered into after litigation had commenced, would not be enforced because it was “unreasonable”). The *Adams* court stated:

we decline to accept the parties’ stipulation that Illinois law should govern We do not believe that we should allow the minor to forgo what benefits may exist for him under the Florida statute and to stipulate instead to the application of what is perhaps the more stringent provision.

Id. at 639. Of course, the validity of a choice-of-law agreement antedating litigation may be subject to a different analysis.

62. See *Von Hundertmark v. Boston Prof’l Hockey Ass’n, Inc.*, No. CV-93-1369 (CPS), 1996 WL 118538, at *4 (E.D.N.Y. Mar. 7, 1996) (recognizing that there is no prohibition under New York law to party stipulation of choice of law in tort actions and that “choice of law clauses are routinely enforced so long as there is a reasonable basis for the choice or the state whose law is selected has sufficient contacts with the transaction”). See generally RESTATEMENT (SECOND) OF CONFLICTS § 187(2) (1971) (“The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless . . . (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice.”); Thomas P. Hanley, *Enforcing Governing Law Clauses in Contracts*, N.Y. L.J., Jan. 18, 2001, at 1 (stating that despite a New York statute governing certain large transactions, which provides that “the parties’ governing law clause must be enforced, regardless whether the underlying transaction bears a reasonable relationship to New York State . . . several federal courts have persisted in requiring a sufficient connection between the agreement at issue and this state before upholding a contractual stipulation of New York law”); Michael A. Rosenhouse, Annotation, *Validity and Effect of Stipulation in Contract to Effect That It Shall Be Governed by Law of Particular State Which Is Neither Place Where Contract Is Made Nor Place Where It Is to Be Performed*, 16 A.L.R.4th 967 (2005) (stating that enforcement is rarely allowed).

63. *Churchill Corp. v. Third Century, Inc.*, 578 A.2d 532, 537 (Pa. Super. Ct. 1990) (stating that “Pennsylvania courts will uphold choice-of-law provisions in contracts to the extent that the transaction bears a reasonable relation to the chosen forum”).

64. *Id.* (stating, in a dispute arising from a lease of office equipment, that it was unclear whether a choice-of-law provision that was not bargained-over was valid, but that it was unnecessary to resolve that issue because the parties agreed as to which state’s law applied).

65. See, e.g., *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 54 (1995) (enforcing a choice-of-law provision in a standard form contract); *Volt Info.Sci., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989) (upholding a “standard” choice-of-law provision).

state's tort law is applicable to a dispute between a foreign program participant and a program provider, then the most important consideration may be the states' respective positions on the validity of written releases limiting liability for negligence or continued adherence to charitable immunity. States differ widely in their willingness to enforce written releases.⁶⁶ The law of some jurisdictions will be more favorable to defendant program providers than others. So too, while charitable immunity has been abolished or severely limited in several states, it retains continued vitality in other states.⁶⁷ In one recent case, a student, who was domiciled in Connecticut, brought an action against a university located in New Jersey for personal injuries sustained in New York during a university club rugby event.⁶⁸ The Second Circuit held that the university's motion to dismiss was properly granted because New Jersey's charitable immunity law applied to the dispute.⁶⁹

A somewhat different question is whether the contract between a program provider and a participant could (or should) say that a tort suit will be governed by the law of the country that is the host site for the foreign program. In some cases, such a choice might be reasonable. European countries, for example, have tort regimes that are in many respects similar to American law.⁷⁰ A student

66. See Mary Ann Connell & Frederick G. Savage, *Releases: Is There Still a Place for Their Use by Colleges and Universities?*, 29 J.C. & U.L. 579, 617 (2003) (stating that "[s]ome courts emphasize the public interest in holding releases invalid when the service or activity is essential and cannot be obtained elsewhere, while others focus on the bargaining power of the respective parties. Some courts enforce releases containing broad, general language; others do not. Some courts require that the word 'negligence' be used to release a party from its own negligence; others do not. Some demand evidence that the release was 'negotiated' and 'bargained for,' while other courts place no emphasis on this requirement. Most courts uphold clearly expressed releases in situations where the activity at question is voluntary, but not all do so"). See also Respondent's Brief at 6, *Paneno v. Centres for Academic Programmes Abroad Ltd.*, 13 Cal. Rptr. 3d 759 (Ct. App. 2004) (No. B162753) (describing a broadly-worded release); *Gonzalez v. Univ. Sys. of N.H.*, 38 Conn. L. Rptr. 673 (Super. Ct. 2005) (holding release invalid in suit involving a cheerleading accident); *Lemoine v. Cornell Univ.*, 769 N.Y.S.2d 313, 315-16 (App. Div. 2003) (holding that a release barred university liability for injuries a student sustained in a climbing wall accident); *Wheeler v. Owens Cmty. Coll.*, No. 2003-07855, 2005 WL 106781, at *5 (Ohio Ct. Cl. Jan. 11, 2005) (holding that "language of the release was too general to be enforceable because it purport[ed] to release [the] defendant from any type of misconduct, whether it be negligent, wanton or willful misconduct"); *Fay v. Thiel Coll.*, 55 Pa. D. & C.4th 353, 360 (Ct. Com. Pl. 2001) (holding that an exculpatory clause contained in the waiver of liability form signed by the student who participated in a study abroad program in Peru was an invalid contract of adhesion because the "form was presented to plaintiff on a take-it-or-leave-it basis").

67. See generally JOHNSON & GUNN, *supra* note 33, at 853-59 (discussing abrogation and restoration of charitable immunity).

68. *Gilbert v. Seton Hall Univ.*, 332 F.3d 105, 106 (2d Cir. 2003).

69. *Id.*

70. See EUROPEAN GROUP ON TORT LAW, *PRINCIPLES OF EUROPEAN TORT LAW* (2005), available at www.egt.org. See generally Bernhard A. Koch, *The "European Group on Tort Law" and Its "Principles of European Tort Law"*, 53 AM. J. COMP. L. 189, 191 (2005) (stating that the *Principles* "present a common framework both for the further development of national laws and for uniform European legislation"). In Europe, tort damages awards are often considerably less than in the United States. See Anita Bernstein, *Muss Es Sein? Not Necessarily*,

participating in a summer program in Austria is subject to the criminal laws of that country.⁷¹ Why would it be unfair to say that the student's rights to recover for personal injury or property damage occurring in Austria will be determined under Austrian tort law? In commercial contexts, courts have upheld choice-of-law provisions selecting the law of a foreign country with a clear relationship to the contract.⁷² A court might well defer to a choice of the law of an international education program's host country if the choice offers viable tort remedies.⁷³ Dicta in federal court cases has said that the parties cannot agree that their disputes will be governed by "the Code of Hammurabi" because that ancient code is nowhere in force.⁷⁴ However, if the parties agree that a dispute shall be governed by a living, current body of law, judicial deference to that choice may follow. As the Seventh Circuit has recognized, while a "court has an interest . . . in applying a body of law that is in force somewhere, [it has] less interest in which such body of law to apply."⁷⁵

Some countries, such as China, have nothing even roughly equivalent to American tort law.⁷⁶ Therefore, a provision in an educational program contract,

Says Tort Law, 67 L. & CONTEMP. PROB. 7, 22 n.55 (2004) (stating that "in Europe, Canada, Japan, and Australia . . . plaintiffs are awarded much lower judgments"). Also, in Europe, contingent fees are generally not permitted, so plaintiffs have greater difficulty gaining access to the courts. Virginia G. Mauer, Robert E. Thomas & Pamela A. DeBooth, *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L L. & BUS. 272, 320 (1999) ("The percentage contingency fee is not permitted in most of the continental legal systems."). However, these impediments to recovery would presumably not apply if an American court and jury were applying European tort law principles.

71. U.S. Dep't. of State, Consular Information Sheet: Austria, http://travel.state.gov/travel/cis_pa_tw/cis/cis_965.html (last visited Apr. 26, 2006) (stating that "[p]ersons violating Austrian laws, even unknowingly, may be expelled, arrested or imprisoned").

72. *Cf. Twohy v. First Nat'l Bank of Chi.*, 758 F.2d 1185, 1191 n.2 (7th Cir. 1985) (enforcing a stipulation of Spanish law in a suit involving tort claims for fraud, misrepresentation, and libel because the law of Spain bore a "significant relationship to or [had] significant contacts with the parties and alleged transaction and injury in this suit." Furthermore, "[t]he relationship of the parties was centered in Spain, the alleged injury occurred in Spain, and the alleged loan agreement was both negotiated in Spain and intended to be performed in Spain"); *El Pollo Loco, S.A. de C.V. v. El Pollo Loco, Inc.*, 344 F. Supp. 2d 986, 988 (S.D. Tex. 2004) (finding that a provision designating Mexican law as governing "[a]ll disputes which may arise in connection with the performance of this Agreement" was sufficiently broad to require application of Mexican law to tort claims).

73. New Zealand does not have a conventional tort system. An accident compensation scheme substitutes for tort remedies. See Stephen Todd, *Privatization of Accident Compensation: Policy and Politics in New Zealand*, 39 WASHBURN L.J. 404, 495 (2000). "Visitors, like everyone else, can make a claim," but entitlements are limited. *Id.* at 444.

74. See *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982) ("If the parties had stipulated that the substantive law to be applied was the Code of Hammurabi, we think the district court should have said that it did not have the power to render a decision on that basis. Such a decision could not have any value as precedent, and the production of precedents is a major function of judicial decision-making."); see also *Twohy*, 758 F.2d at 1191 (stating that "a court . . . would lack power to render a decision based on the Code of Hammurabi" because that would "call into question the court's subject matter jurisdiction").

75. See *Lloyd*, 694 F.2d at 495.

76. See Vincent R. Johnson & Brian T. Bagley, *Fighting Epidemics with Information and*

stating that Chinese law will govern compensation for injuries to a student injured while participating in a program in China, would effectively deny the participant any viable remedy. It is doubtful that an American court would defer to such a choice.⁷⁷ Contractual choice-of-law provisions are ineffective when adherence to the parties' selected law would frustrate public policy.⁷⁸ Relegating a student to recovery under principles of law of a country which offers no realistic chance for adequate compensation would surely violate American public policy.

While minimizing uncertainty about applicable law is a desirable goal, great care should be exercised before specifying in the program provider-participant contract that disputes are to be governed by the law of another country. First, American courts typically have little expertise in applying foreign law. The skills of American judges educated in the common-law tradition may be insufficient for accurately interpreting and applying, for example, the German Civil Code.⁷⁹ To that extent, the court may be unwilling to defer to the parties' choice-of-law (since it burdens the limited resources of the court), may apply the foreign law erroneously (which may generate appeals), or may insist on greater briefing by the parties (which will entail delay and expense). Second, before specifying foreign law as the applicable regime, a program provider would need to consult an expert

Laws: The Case of SARS in China, 24 PENN ST. INT'L L. REV. 157, 173 (2005) (discussing the undeveloped state of tort law in China and indicating that before the recent rise of a market economy and the decline of the old-style communism "there was traditionally little need [in China] for a tort system and little tort litigation"); William P. Alford & Yuanyuan Shen, *The Limits of Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125, 147 (1997) (indicating that "the Chinese system defines very narrowly the range of activities actionable under tort law"). See also Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603, 617 (2003) (noting on-going efforts to draft China's first tort law).

77. Cf. *Cent. Soya Co., Inc. v. Epstein Fisheries, Inc.*, 676 F.2d 939, 941 (7th Cir. 1982) ("The parties and the district court have treated this as a case governed by general common law, much as if *Erie R. R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), had never been decided. We do not think we could be required by a stipulation of the parties to decide a case according to a body of law that is nowhere in force, and that is what we would be doing if we tried to decide this case under general common law.").

78. See *Keller v. Brunswick Corp.*, 369 N.E.2d 327, 329 (Ill. Ct. App. 1977) (stating that "[w]hile the parties may have intended to make a limited choice of Wisconsin law in this case, i.e., a choice of the Wisconsin law necessary to interpret only the ambiguous terms of their agreement, we cannot allow such an agreement to violate the clear requirements of the Wisconsin Fair Dealership Law which was in effect when the parties entered their contract"). See also *Fulcrum Fin. Partners v. Meridian Leasing Corp.*, 230 F.3d 1004, 1011 (7th Cir. 2000) (stating that in contract cases, "Illinois respects the contract's choice-of-law clause as long as the contract is valid and the law chosen is not contrary to Illinois's fundamental public policy"). See generally 12 ILL. LAW AND PRACTICE: CONTRACTS § 163 (2006) ("The power by which courts may declare a contract void as against public policy is far-reaching . . . [but courts] should not hold contracts void as against public policy unless they are clearly and unmistakably so. In order that a contract may be declared void as being against public policy, the line of that policy must be clear and distinct, and, in the absence of express legislative or constitutional prohibition, the court must find that the contract is injurious in some way to the interests of society.").

79. Cf. *Ezell v. Hayes Oilfield Constr. Co., Inc.*, 693 F.2d 489, 492 (5th Cir. 1982) (discussing, in a conflict-of-law context, the "great difficulty for federal judges unaccustomed to treading the narrow path of the civil law").

about whether foreign law protects the interests of the program provider more effectively than American law. That consultation process could itself be slow, time-consuming, and costly. In short, a contractual choice-of-law provision that specifies foreign law as the source of tort principles (in contrast to a clause that specifies the law of an American state) might well add unnecessary layers of uncertainty and difficulty to the task of minimizing tort liability related to an international education program.

III. CHOICE OF ARBITRATION

An agreement between a program provider and participants might also provide for arbitration of disputes,⁸⁰ and that provision may explicitly⁸¹ or implicitly encompass arbitration of tort claims arising in connection with the program. However, whether an arbitration clause will confer an advantage on a program provider defending against a tort claim is a matter of both construction of the provision and dispute-resolution perspective.⁸²

First, while broadly-worded arbitration provisions⁸³ are often held to include resolution of tort claims,⁸⁴ some courts hold that only if a tort claim arises out of

80. Public policy favors arbitration in cases where the parties have clearly indicated willingness to arbitrate. However, “[a]rbitration clauses must be clear and unequivocal” and “[g]enuine issues of fact will preclude an order to arbitrate.” *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 446 (3d Cir. 2003).

81. Contract language may expressly state that an agreement to arbitrate encompasses tort claims. *See Drafting Dispute Resolution Clauses—A Practical Guide*, 605 PLI/LIT 23, 44 (1999) (suggesting that a financial institution might use language specifying that “[a]ny controversy or claim arising out of or relating to this Agreement . . . including but not limited to a claim based on or arising from an alleged tort, shall at the request of any party be determined by arbitration”); Terry L. Trantina, *An Attorney’s Guide to Alternative Dispute Resolution ADR: “ADR 1.01,”* 1102 PLI/CORP 29, 281 (1999) (containing language “providing for alternative dispute resolution of any and all disputes, controversies or claims, . . . whether based on contract, tort, statute, fraud, misrepresentation or any other legal or equitable theory, arising out of or relating to this Agreement”).

82. *See also* GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 321 (2001) (“It is common for disputes to arise in international arbitration over the arbitrability of common law tort claims.”).

83. *See* Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 SUFFOLK TRANSNAT’L L. REV. 221, 227 (1998) (opining that a “broad clause should contain three key expressions: ‘all disputes,’ ‘in connection with,’ and ‘finally settled’”).

84. *See* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402–04 (1967) (holding that an arbitration clause required that a fraud claim that was related generally to the contract had to be arbitrated because the alleged fraud did not relate specifically to the arbitration provision itself); *Pierson v. Dean Witter, Reynolds, Inc.*, 742 F.2d 334, 338 (7th Cir. 1984) (holding that claims of fraud under a contract, breach of fiduciary duty, negligence, and gross negligence were not immune from arbitration under a broadly-worded and valid arbitration clause); *Bos Material Handling, Inc. v. Crown Controls Corp.*, 186 Cal. Rptr. 740, 745 (Ct. App. 1983) (stating that “where contracts provide arbitration for ‘any controversy . . . arising out of or relating to the contract,’” arbitration is required as long as the tort claims “have their roots in the relationship between the parties which was created by the contract”); *Gratech Co., Ltd. v. Wold Eng’g, P.C.*, 672 N.W.2d 672, 678 (N.D. 2003) (requiring arbitration of tort claims); *Valero Energy Corp. v. Wagner & Brown, II*, 777 S.W.2d 564, 567 (Tex. App. 1989) (“[W]hen the

the contract itself, or its resolution necessitates reference to the contract, must the claim be arbitrated.⁸⁵ Thus, courts have sometimes said that:

If a tort claim is so interwoven with the contract that it cannot stand alone, it falls within the scope of an agreement to arbitrate; if, on the other hand, a tort claim is completely independent of the contract and could be maintained without reference to the contract, it falls outside the scope of an agreement to arbitrate.⁸⁶

The mere fact that the tort claim involves parties who entered into a contract containing an arbitration clause, will not, in some states, take a tort claim out of court.⁸⁷ If an arbitration clause does encompass a tort claim, there will be a

parties have agreed to arbitrate any dispute or disagreement 'arising under the contract,' all disputes of whatever nature, including those sounding in tort, that are directly and closely related to the performance of the contract and are otherwise arbitrable, are subject to arbitration upon the demand of a party to the agreement.''). See generally Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*, 59 ALB. L. REV. 905, 932 (1996).

85. See *Dusold v. Porta-John Corp.*, 807 P.2d 526 (Ariz. Ct. App. 1990) (holding that the arbitration clause in a licensing agreement did not apply to personal injury tort claims associated with the licensee's exposure to chemicals supplied by the licensor because the suit did not contend that the duty to warn the licensee of the toxic nature of the chemicals arose out of any contractual obligation that required reference to the contract to resolve the dispute); *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 638 (Fla. 1999) (stating that "the determination of whether a particular claim must be submitted to arbitration necessarily depends on the existence of some nexus between the dispute and the contract containing the arbitration clause" and holding that a tort claim against a home builder for carbon monoxide poisoning, based on the design of a garage, was not subject to arbitration). In *Seifert*, the court reasoned:

If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract. Analogously, such a claim would be one arising from the contract terms and therefore subject to arbitration where the contract required it. *If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising from the contract, but sounds in tort.* Therefore, a contractually-imposed arbitration requirement . . . would not apply to such a claim.

Id. at 639 (quoting *Dusold*, 807 P.2d at 529–31) (citations omitted).

86. *Assoc. Glass, Ltd. v. Eye Ten Oaks Inv., Ltd.*, 147 S.W.3d 507, 513 (Tex. App. 2004) (finding tort claims covered by the arbitration provision); *Dr. Kenneth Ford v. NYLCARE Health Plans of Gulf Coast, Inc.*, 141 F.3d 243, 250 (5th Cir. 1998) (stating similar test).

87. See *Lovey v. Regence BlueShield of Idaho*, 72 P.3d 877, 887 (Idaho 2003) ("For a tort claim to be considered as 'arising out of or relating to' a contract, it must, at a minimum, raise some issue the resolution of which requires reference to or construction of some portion of the contract itself. The required relationship between the dispute and the contract does not exist simply because the dispute would not have arisen absent the existence of the contract between the parties.") (citations omitted). See also W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 65 (3d ed. 2000) ("Since the very mechanism of arbitration is created by contract, and since the judicial sanction of tortious conduct does not contemplate a contractual relationship between plaintiff and defendant, claims based on alleged torts are generally not arbitrated. . . . [A]rbitration clauses contained in contracts antedating the dispute . . . may or may not, depending to a great extent on their wording, be deemed to cover claims of wrongful behavior that does not constitute breach of contract but is nevertheless connected with the contractual relationships.").

choice-of-law question as to what law should be applied by the arbitrators in resolving the underlying dispute. If the arbitration clause specifies governing law, that choice will raise the issues similar to those discussed above relating to whether contractual choice-of-law provisions will be followed by courts.⁸⁸

Some authorities argue that arbitration is inefficient because it often does not result in cost savings.⁸⁹ Writers also say that referral to arbitration injects into the dispute resolution process a level of legal unpredictability⁹⁰ that will be disadvantageous to some or all of the participants. In some instances, a program provider may therefore be better off having a tort claim reviewed by the judiciary in forums where clearly articulated rules of substantive and procedural law apply and where legal errors are subject to correction through appellate review.⁹¹

IV. CHOICE OF FORUM

A question closely related to the efficacy of contractual choice-of-law⁹² or choice-of-arbitration⁹³ provisions is the issue of whether the parties to a study abroad agreement may, if they prefer litigation to arbitration, *contractually* specify the forum in which a *tort* claim will be litigated. The answer to this question echoes the analysis offered in the preceding sections. On the one hand, similar to choice-of-law provisions, choice-of-forum provisions must be reasonable. On the other hand, like an arbitration clause, a contractual choice-of-forum provision will govern the resolution of a tort claim only if that claim has such a relationship to the contract that it is fair to say that contractual language governs forum selection for the tort action.⁹⁴

88. See generally EDWARD BURNETT, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 79–83 (2006) (discussing power of parties to vary federal law by agreement); GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 25 (1994) (“International arbitrators typically give effect to the parties’ agreements concerning applicable law.”); *id.* at 121 (“Despite this general recognition of party autonomy in the selection of substantive law, . . . some states will not enforce choice-of-law agreements if either: (a) the chosen law lacks a reasonable relationship to the parties’ transaction; or (b) the chosen law is contrary to some fundamental public policy of the forum, or, less clearly, another state.”); Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT’L L. 1189, 1219–20 (2003) (discussing governing law and stating that in some instances the “party provision may not be controlling”).

89. See Steven J. Burton, *Combining Conciliation with Arbitration of International Commercial Disputes*, 18 HASTINGS INT’L & COMP. L. REV. 637, 637 (1995) (“Though quick and inexpensive arbitration proceedings are possible, the delay and expense can be great when the stakes are high.”).

90. See William H. Krull, III & Noah B. Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option*, 11 AM. REV. INT’L ARB. 531, 545 (2000) (discussing unpredictable or unprincipled arbitration awards).

91. See *id.* at 531 (“[F]inality would always be an asset if arbitrators, unlike distinguished judges, never made mistakes.”).

92. See *supra* Part II.

93. See *supra* Part III.

94. See *Terra Int’l, Inc. v. Miss. Chem. Corp.*, 922 F. Supp. 1334, 1397 (N.D. Iowa 1996) (“[T]he critical question is not whether the language of the forum selection clause at issue

Addressing the first issue—the reasonableness of the contractually chosen forum—one court recently summarized the law as follows:

as a general principle, private parties may agree to conduct all potential litigation arising out of a contract in a single jurisdiction. Such Merger Agreements are presumptively valid and will be enforced by the forum unless the party objecting to its enforcement establishes: (i) it is a result of fraud or overreaching; (ii) enforcement would violate a strong public policy of the forum; or (iii) enforcement would, in the particular circumstances of the case, result in litigation in a jurisdiction so seriously inconvenient as to be unreasonable. Generally put, forum selection clauses are enforced so long as enforcement at the time of litigation would not place any of the parties at a substantial and unfair disadvantage or otherwise deny a litigant his day in court.⁹⁵

A contractual forum-selection clause requiring claims by study abroad participants to be litigated in an American state where the program provider is located, where the participant resides, or where a substantial part of the contract is to be performed might well be found to be reasonable. In contrast, a clause requiring an *American program participant* to litigate a tort claim against an *American program provider* in a foreign country may be subject to challenge. Whether that challenge will be successful will depend upon the particular facts of the case. Requiring a program participant to litigate a claim in a far away country with an under-developed legal system might be so seriously inconvenient as to effectively deny the litigant a day in court.

The same is not necessarily true if one of the parties—the claimant or the program provider—is located in the foreign country which the choice-of-forum provision specifies as the forum for disputes. That choice might be deemed to be reasonable since, when litigants reside in different countries, one or the other will inevitably be disadvantaged by litigating far from home.⁹⁶ Indeed, in cases involving commercial disputes, courts have sometimes approved the choice of a forum located in a country to which neither party had a continuing relationship. In one suit, where “a Houston-based American corporation, contracted with . . . a German corporation, to tow . . . [a] drilling rig . . . from Louisiana to a point off Ravenna, Italy,”⁹⁷ the Supreme Court of the United States upheld a forum-selection provision specifying the London Court of Justice.⁹⁸ As Chief Justice

expressly encompasses non-contract claims, but instead whether the non-contract claims asserted are directly or indirectly related to the contractual relationship of the parties.”), *aff’d*, 119 F.3d 688, 693–95 (8th Cir. 1997).

95. Hadley v. Shaffer, No. Civ. A. 99-144-JJF, 2003 WL 21960406, at *4 (D. Del. Aug. 12, 2003).

96. Cf. *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 202 (3d Cir. 1983) (rejecting, in a suit involving contract and tort claims related to a contract between a New Jersey corporation and a British corporation, the argument that the contractual choice of an English forum was “seriously inconvenient”), *overruled on other grounds by* *Lauro Lines v. Chasser*, 490 U.S. 495 (1989).

97. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 2 (1972).

98. *Id.* at 12 (holding that a forum-selection clause in a commercial agreement negotiated at

Warren Burger explained: “[n]ot surprisingly, foreign businessmen prefer . . . to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter. Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation.”⁹⁹

Today, some courts, but not all, give heightened scrutiny to the fairness of forum-selection clauses not specifically negotiated by the parties.¹⁰⁰ Courts also hold that “any ambiguity as to the mandatory or permissive nature of the forum selection clause should be construed against . . . [the] drafters.”¹⁰¹

Addressing the second issue—whether a contractual choice-of-forum provision governs claims in tort, as well as claims in contract—courts often focus on the source of the duty underlying the tort claim. Thus, in a suit by an American third-party beneficiary (Coastal) to an English contract between English companies (Farmer Norton and Tilghman), which contained a forum-selection clause specifying English courts, the Second Circuit wrote:

The second circumstance relied on by the district court for denying enforcement [of the choice of the English forum] is that Coastal has asserted tort claims as well as contract claims, and that the forum selection clause is inapplicable to the former. The difficulty with this reasoning is that it ignores the reality that the Tilghman-Farmer Norton contract is the basic source of *any* duty to Coastal. There is no evidence suggesting that the clause was not intended to apply to all claims growing out of the contractual relationship. If forum selection clauses are to be enforced as a matter of public policy, that same public policy requires that they not be defeated by artful pleading of claims such as negligent design, breach of implied warranty, or misrepresentation. Coastal’s claims ultimately depend on the existence of a contractual relationship between Tilghman and Farmer Norton, and those parties bargained for an English forum. We agree with those courts which have held that where the relationship between the parties is contractual, the pleading of alternative non-contractual theories of liability should not prevent enforcement of such a bargain. . . . [D]isregarding the forum selection clause was on this record improper.¹⁰²

Consequently, whether a forum-selection clause encompasses a tort claim may depend upon the source of the duty at issue. If the director of a study abroad program negligently backs a rental car over a program participant, it is doubtful that the resulting tort claim will be subject to a contractual choice-of-forum

arm’s length should be enforced by the courts in the absence of a compelling countervailing reason that would make enforcement unreasonable).

99. *Id.* at 11–12.

100. See *Forrest v. Verizon Commc’n, Inc.*, 805 A.2d 1007, 1011 n.9 (D.C. 2002) (discussing the split of authority).

101. *Beckley v. Auto Profit Masters, L.L.C.*, 266 F. Supp. 2d 1001, 1004 (S.D. Iowa 2003) (holding that a forum selection clause was permissive, rather than mandatory).

102. *Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983), *overruled on other grounds by* *Lauro Lines v. Chasser*, 490 U.S. 495 (1989).

provision. The duty to exercise reasonable care in driving does not arise from the program provider-participant contract, but instead, if American law applies, from garden-variety common-law principles.¹⁰³ Resolution of that tort claim also does not require reference to the terms of the program participation agreement. In contrast, if a program provider is sued for misrepresentation based on allegedly false statements in the program's advertising materials, those tort allegations may be so closely tied to the contractual relationship, and to related contract-law claims, that it is fair to say that they are encompassed by a forum-selection clause in the contract between the defendant program provider and the plaintiff participant.¹⁰⁴ "The better general rule . . . is that contract-related tort claims involving the same operative facts as a parallel claim for breach of contract should be heard in the forum selected by the contracting parties."¹⁰⁵ Of course, a broadly-worded forum-selection clause is more likely to be deemed to encompass tort claims, because "[w]hether tort claims are governed by forum selection provisions depends upon the intention of the parties as reflected by the wording of the particular clauses and the facts of each case."¹⁰⁶

V. THEORIES OF RESPONSIBILITY

Under American law, a program provider may be liable for injuries sustained by a participant in an international educational program under a broad array of theories. These bases of liability include: fault, respondeat superior, nondelegable duty, and ostensible agency.

A. Fault

First, an educational program may be subject to fault-based liability, such as

103. *Beckley*, 266 F. Supp. 2d at 1004–05 (holding that a forum-selection clause in a consulting agreement applied only to the business's claims for breach of contract, and did not preclude the business from filing suit in another forum for fraudulent inducement, rescission, and violation of the Racketeer Influenced and Corrupt Organizations Act (RICO)).

104. *But see id.* at 1005 (holding that a forum selection clause was inapplicable for a claim for fraudulent inducement because that claim was "actionable independent of the contract itself").

105. *Lambert v. Kysar*, 983 F.2d 1110, 1121–22 (1st Cir. 1983). *See also* *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 119 F.3d 688, 693–95 (8th Cir. 1997) (reviewing in detail the various tests adopted by courts for determining whether a contractual choice-of-forum provision encompasses tort claims and holding that the relevant question is whether the "tort claims involve the same operative facts as would a parallel claim for breach of contract"); *CoBank, ACB v. Reorganized Farmers Coop. Ass'n*, No. 04-3385, 2006 WL 620864, at *7 (10th Cir. Mar. 14, 2006) ("[G]enerally speaking, other circuits applying state law have determined a contract forum provision cannot apply to tort claims unless the provision is broad enough to be construed to cover such claims or the tort claims involve the same operative facts as a parallel breach of contract claim.") (citations omitted).

106. *Digital Envoy, Inc. v. Google, Inc.*, 319 F. Supp. 2d 1377, 1380 (N.D. Ga. 2004) (holding that claims against a licensee for misappropriation of trade secrets, unfair competition, and unjust enrichment, which were all premised on allegations that licensee's use of software had gone beyond scope of the license agreement, came within scope of the agreement's forum-selection clause, which applied to "[a]ny lawsuit regarding this agreement").

claims for negligent hiring,¹⁰⁷ training,¹⁰⁸ supervision,¹⁰⁹ or retention of employees or agents;¹¹⁰ negligent selection, retention, or discipline of participants;¹¹¹ or negligent failure to protect business invitees (e.g., students) from hazards on a foreign premises over which the program exercises control (e.g., classrooms or study areas).¹¹² The principles of negligence-based liability will be

107. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 19 (Proposed Final Draft No. 1, 2005) (citing cases on negligent hiring).

108. Cf. *Saville v. Sierra Coll.*, No. C047923, 2005 WL 3150521, at *2 (Cal. Ct. App. Nov. 28, 2005) (holding that plaintiff failed to plead facts that would support a claim that college negligently failed to provide skilled instructors for a peace officer training class involving physical maneuvers).

109. See *Molinari v. Tuskegee Univ.*, 339 F. Supp. 2d 1293, 1301–02 (M.D. Ala. 2004) (finding that a cause of action was stated as to whether allegedly negligent supervision of a professor caused injuries to a student who was kicked by a cow); *Shlien v. Bd. of Regents, Univ. of Neb.*, 640 N.W.2d 643, 650 (Neb. 2002) (discussing a claim based on alleged negligence for failing to properly supervise a professor's Internet access and failing to have safeguards in place to prevent unauthorized publication of student material); *Wood v. N.C. State Univ.*, 556 S.E.2d 38, 39 (N.C. Ct. App. 2001) (alleging negligent retention and supervision of a professor who allegedly committed sexual harassment).

110. See *Bell v. Univ. of V.I.*, No. Civ. 2000-0062, 2003 WL 23517144, at *3–4 (D.V.I. Nov. 19, 2003) (finding that a claim was stated for alleged negligent hiring and retaining of a professor who was known to be dangerous to students).

111. See *Marro v. Fairfield Univ.*, No. CV040410044S, 2005 WL 3164148, at *2 (Conn. Super. Ct. Nov. 10, 2005) (holding that it could not be said as a matter of law that a university, which allegedly had knowledge of students leaving the campus, consuming alcoholic beverages, and driving back to the university, had no duty to enforce its rules against such conduct). Cf. *Varner v. District of Columbia*, 891 A.2d 260, 268–69 (D.C. 2006) (finding that parents failed to establish the standard of care in a wrongful death suit alleging that the murder of their son resulted from the university's insufficient disciplining of the student-murderer prior to the attack).

112. See Appellant's Opening Brief at 5, *Paneno v. Centres for Academic Programmes Abroad Ltd.*, 13 Cal. Rptr. 3d 759 (Ct. App. 2004) (No. B162753) (describing claims for negligence and premises liability); *Miano v. State Univ. Constr. Fund*, 736 N.Y.S.2d 556, 556 (App. Div. 2002) (“[D]uties [to warn or make safe] were assumed by the College when it took control over the construction area.”). See also *Rogers v. Del. State Univ.*, No. Civ. A. 03C-03-218-PLA, 2005 WL 2462271, at *6 (Del. Super. Ct. Oct. 5, 2005) (holding that a university that temporarily placed students in off-campus housing “had assumed a duty to provide the displaced students with reasonably safe accommodations”). Persons who exercise control over the real property of others may be held liable if their invitees are injured on that property. See generally *Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322 (Fla. Dist. Ct. App. 1991) (holding that a duty of reasonable care to patrons extended to adjacent lots where patrons parked in accordance with the instructions of security guards), *appeal dismissed*, 589 So. 2d 291 (Fla. 1991); *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110, 1120–21 (N.J. 1993) (stating that a real estate broker owes reasonable care to prospective buyers touring an open house); *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 324 (Tex. 1993) (finding that a lessee exercised control over a construction ramp, even though the lease covered only space inside the building); *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909, 914 (7th Cir. 1985) (“Whoever controls the land is responsible for its safety.”). Of course, there may be a real question as to whether a program exercises “control” over a foreign educational premises. An American program provider may be permitted to use the classrooms and offices of a foreign college or university, but it may have no right to make alterations to those facilities or even to employ persons to clean or make repairs. Presumably, these limitations will be relevant to determining just what the duty of reasonable care requires. It may be fair to expect the American program provider to call dangers to the attention of the foreign host institution or program participants, but not fair to fault the American

considered in detail below in Part VI.

B. Respondeat Superior

Second, a program provider may be subject to strict liability of a respondeat superior¹¹³ variety for the torts of employees¹¹⁴ committed within the scope of their employment.¹¹⁵ In the study abroad context, the scope of employment for administrators and faculty members may be broad.¹¹⁶ The director of a foreign program may be “on duty” virtually all day.¹¹⁷ If an American-run foreign study program employs foreign faculty or staff, different legal principles may govern liability issues relating to that employment relationship.¹¹⁸ The faculty member’s day may consist of activities, which, though not separately compensated,¹¹⁹ in a

program provider for repairs that have not been made. *Cf. Bird v. Lewis & Clark Coll.*, 303 F.3d 1015, 1022 (9th Cir. 2002) (affirming the rejection of a proposed jury instruction relating to accommodation of disabilities under federal law because the instruction implied that an American college was “required to make structural modifications to the buildings in Australia”).

113. Respondeat superior is a Latin phrase meaning “let the superior make answer.” BLACK’S LAW DICTIONARY 1338 (8th ed. 2004).

114. If the employee did not commit a tort, the theory of respondeat superior is inapplicable. *See Geiersbach v. Frieje*, 807 N.E.2d 114, 122 (Ind. Ct. App. 2004) (holding that summary judgment was properly granted to the coaches and the university was not vicariously liable).

115. *Cf. Chambers v. Lehmann*, No. 262502, 2005 WL 2291889 (Mich. Ct. App. Sept. 20, 2005) (discussing a tort claim involving a university vehicle driven by a university employee on campus).

116. Courts differ in how tightly or narrowly they focus the scope-of-employment inquiry. *Compare Farmers Ins. Group v. County of Santa Clara*, 906 P.2d 440, 448 (Cal. 1995) (“In California, the scope of employment has been interpreted broadly. . . . For example, ‘the fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer.’ . . . Moreover, ‘where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer.’”) (citations omitted), *with O’Toole v. Carr*, 815 A.2d 471, 473 (N.J. 2003) (declining to adopt a broad approach which would too readily subject businesses to liability for harm incidental to their activities).

117. This is important because “off-duty” conduct is ordinarily not within the scope of employment. *See Freeman v. Busch*, 150 F. Supp. 2d 995, 1004 (S.D. Iowa 2001) (holding, in part, that a college was not vicariously liable for a student employee’s alleged omissions of his duties as a security guard because the student employee was not on duty when a party guest was raped in a dormitory). *See also Burroughs v. Massachusetts*, 673 N.E.2d 1217, 1219 (Mass. 1996) (holding that an off-duty national guard member who served as a bartender at the armory was not within the scope of his employment); *Ginther v. Domino’s Pizza, Inc.*, 93 S.W.3d 300 (Tex. App. 2002) (finding no liability because the driver’s shift had ended and he had left work almost two hours earlier).

118. *See generally* Part II (discussing choice of law).

119. *Cf. Bishop v. Texas A & M Univ.*, 35 S.W.3d 605, 607 (Tex. 2000) (holding, in a suit arising from an accidental stabbing during a university play, that the faculty advisors to a drama club were employees, not volunteers, because, even though they were not separately paid for that activity, service as an advisor to a student organization was considered in determining overall compensation).

very real sense are intended, at least in part, to benefit the business purposes¹²⁰ of the program provider. Entertaining visiting faculty members, hosting dinners, and leading walking tours around the town may fall within this category. An excursion down the valley by car with other faculty members might be a mixture of business and pleasure, and if an auto accident occurs, there may be a plausible argument that the allegedly negligent driving was within the scope of the director's employment.¹²¹ Conduct—even ill-advised conduct¹²²—that is intended, in part, to further the business purposes of the employer,¹²³ and done as part of the employer's business,¹²⁴ may raise an issue of fact sufficient to support a finding of respondeat superior liability.¹²⁵

120. See RESTATEMENT (THIRD) OF AGENCY § 7.07 (Tentative Draft No. 5, 2004) ("An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer."); *Haybeck v. Prodigy Servs. Co.*, 944 F. Supp. 326, 331 (S.D.N.Y. 1996) (holding that having sex with a company client away from the place of employment was not within the scope of employment even if the employee's conduct arose in part from a desire to encourage the plaintiff to use more of the employer's services), *appeal dismissed on other grounds*, 116 F.3d 465 (2d Cir. 1997).

121. See, e.g., *Mayes v. Goodyear Tire & Rubber Co.*, 144 S.W.3d 50, 56 (Tex. App. 2004) (finding the evidence sufficient to raise a genuine issue of material fact regarding whether a driver was within the course and scope of his employment, despite being on a personal errand, where, among other things, the driver "was available via pager 24 hours a day; and . . . was not restricted in any way from using the truck for personal business").

122. See *Smith v. Lannert*, 429 S.W.2d 8, 15 (Mo. Ct. App. 1968) (holding a grocery store liable for injuries that resulted when a supervisor spanked a cashier for taking an unauthorized break. "[T]he jury could find Lannert's act in striking plaintiff was to enforce employee discipline with respect to orders given by the store manager with reference to employee rest breaks, thus promoting Bettendorf-Rapp's purpose of keeping an adequate work force on the floor and maintaining employee discipline").

123. Cf. *Bell v. Univ. of V.I.*, No. Civ. 2000-0062, 2003 WL 23517144, at *3 (V.I. Nov. 19, 2003) (holding that a university was entitled to partial summary judgment on claims for assault, battery, and intentional and negligent infliction of emotional distress because the plaintiff student did not and could not show that the invasive conduct of the professor "served" the university or that the professor was "hired to push students").

124. See *Commercial Bank v. Hearn*, 923 So. 2d 202, 206-07 (Miss. 2006) (stating that "[a]n indirect benefit to the employer . . . is not the appropriate test for *respondeat superior*. . . . The inquiry is . . . whether, from the *nature of the act itself* as actually done, it was *an act* done in the master's business, or wholly disconnected therefrom by the servant, not as servant, but as an individual on his own account").

125. Section 228 of Second Restatement of Agency provides that the:

Conduct of a servant is within the scope of employment if, but only if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master; and
- (d) if force is intentionally used by the servant against another, the use of the force is not unexpected by the master.

RESTATEMENT (SECOND) OF AGENCY § 228 (1958). The evolving Third Restatement of Agency proposes a somewhat different test for scope of employment:

An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an

C. Non-delegable Duty

Third, although employers,¹²⁶ including educational program providers,¹²⁷ are ordinarily not liable for the torts of agents who are independent contractors,¹²⁸ strict liability may be imposed on an employer if an independent contractor breaches a non-delegable duty.¹²⁹ American law on non-delegable duties is in many respects unclear. The Second Restatement of Torts acknowledges that “[f]ew courts have made any attempt to state any general principles as to when the employer’s duty cannot be delegated, and it may as yet be impossible to reduce these exceptions to such principles.”¹³⁰ However, the same authority then provides that a duty is non-delegable and a principal therefore cannot shift responsibility for the proper conduct of work to an independent contractor if the work requires “special precautions,”¹³¹ is to be done in a public place,¹³² involves instrumentalities used in highly dangerous activities,¹³³ is subject to safety requirements imposed by legislation or administrative regulation,¹³⁴ is itself inherently dangerous,¹³⁵ or involves an “abnormally dangerous” activity.¹³⁶ It is

independent course of conduct not intended by the employee to serve any purpose of the employer.

RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (Tentative Draft No. 5, 2004). Conduct not intended to further any business purpose of the employer ordinarily will not give rise to respondeat superior liability. *See* *Jones v. Baisch*, 40 F.3d 252 (8th Cir. 1994) (stating that leaking confidential information was not within the scope of employment); *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 579 (Tex. 2002) (holding that a manager was not acting within the scope of his employment when he lied during a workplace investigation).

126. *See* RESTATEMENT (SECOND) OF TORTS § 409 (1965) (stating the general rule that a principal is ordinarily not vicariously liable for the torts of an agent who is an independent contractor); *Baptist Mem’l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998) (“Because an independent contractor has sole control over the means and methods of the work to be accomplished, . . . the individual or entity that hires the independent contractor is generally not vicariously liable for the tort or negligence of that person.”). *See also* RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (Tentative Draft No. 2, 2001) (“Respondeat superior is inapplicable when a principal does not have the right to control the actions of the agent.”).

127. *See* *Texas A & M Univ. v. Bishop*, 156 S.W.3d 580, 584–85 (Tex. 2005) (holding that a university was not liable for the allegedly tortious conduct of a play’s director and prop assistant, who were independent contractors rather than state employees).

128. *See* RESTATEMENT (SECOND) OF AGENCY § 2(3) (1958) (“An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.”).

129. *See, e.g., Gazo v. City of Stamford*, 765 A.2d 505, 511 (Conn. 2001) (stating that “the nondelegable duty doctrine means that the party with such a duty . . . may not absolve itself of liability by contracting out the performance of that duty”).

130. RESTATEMENT (SECOND) OF TORTS § 416 introductory note (1965).

131. *Id.* § 416; *see also* § 413 (imposing negligence-based liability relating to harm caused by an independent contractor’s failure to take special precautions).

132. *Id.* §§ 417–18.

133. *Id.* § 423.

134. *Id.* § 424.

135. *Id.* § 427 (“One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to

possible that these broad, loosely-defined categories may encompass certain activities that are part of a foreign study program.

For example, a program provider might be subject to a non-delegable-duty claim based on hiring a person or company to transport a handicapped student who is confined to a wheel chair¹³⁷ or to guide a hike into the mountains on the theory that the transportation or excursion required "special precautions."¹³⁸ Similarly, a program provider operating in a dangerous country¹³⁹ might be liable for an independent contractor's failure to exercise reasonable care in transporting participants, on the ground that the activity of arranging travel for persons in a dangerous country is, by definition, inherently dangerous,¹⁴⁰ in the sense that the risks of harm cannot be eliminated despite the exercise of all reasonable care.¹⁴¹

the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger." One court stated:

The theory upon which this liability is based is that a person who engages a contractor to do work of an inherently dangerous character remains subject to an absolute, nondelegable duty to see that it is performed with that degree of care which is appropriate to the circumstances, or in other words, to see that all reasonable precautions shall be taken during its performance, to the end that third persons may be effectually protected against injury.

Hatch v. V.P. Fair Found., Inc., 990 S.W.2d 126, 134 (Mo. Ct. App. 1999) (quoting 41 AM. JUR. 2D *Independent Contractors* § 41 (1968)).

136. RESTATEMENT (SECOND) OF TORTS § 427A (1965).

137. See *Kelly v. United Airlines, Inc.*, 986 F. Supp. 684, 687 (D. Mass. 1997) (holding, in a suit where a handicapped passenger sustained injuries when she fell out of an aisle chair while being boarded on an airplane, that the airline could be liable, under § 427 of the Restatement of Torts, for the negligence of the contractor who provided the wheelchair services. The Restatement, RESTATEMENT (SECOND) OF TORTS § 427 (1965), imposes "vicarious liability making the employer liable for the negligence of the independent contractor in failing to guard against a special danger, irrespective of whether the employer has itself been at fault").

138. But see *Ignato v. Wilmington Coll., Inc.*, No. 03C-05-87, 2005 WL 2475750, at *1 (Del. Aug. 22, 2005) (finding the "peculiar risk" doctrine of the Restatement, RESTATEMENT (SECOND) OF TORTS § 413 (1965), inapplicable to the case of a student injured during flight training).

139. For example, a dangerous country may be considered one for which the U.S. State Department has issued a Travel Warning. "Travel Warnings are issued when the State Department recommends that Americans avoid a certain country." See U.S. Dep't of State, Current Travel Warnings, http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html (last visited Apr. 25, 2006).

140. But see *Chainani v. Bd. of Educ. of N.Y.*, 663 N.E.2d 283, 287 (N.Y. 1995) ("[T]he activity of transporting children by bus to and from school—successfully accomplished countless times daily—does not involve that sort of inherent risk for the nonnegligent driver and is simply not an inherently dangerous activity so as to trigger vicarious liability.").

141. *Id.* In *Chainani*, the court explained the non-delegable-duty rule relating to inherently dangerous activities in the following terms:

This State has long recognized an exception from the general rule [of non-liability for the acts of an independent contractor] where, generically, the activity involved is "dangerous in spite of all reasonable care." . . . This exception applies when it appears both that "the work involves a risk of harm inherent in the nature of the work itself [and] that the employer recognizes, or should recognize, that risk in advance of the contract."

Id. (emphasis added) (citations omitted).

The Restatement commentary explains this type of employer liability for the conduct of an independent contractor in these words:

It is not . . . necessary to the employer's liability that the work be of a kind which cannot be done without a risk of harm to others *It is sufficient that work of any kind involves a risk, recognizable in advance, of physical harm to others which is inherent in the work itself, or normally to be expected in the ordinary course of the usual or prescribed way of doing it, or that the employer has special reason to contemplate such a risk under the particular circumstances under which the work is to be done.*¹⁴²

The sweep of this definition of what constitutes an “inherently dangerous” activity is soberingly broad. Although a number of recent cases have imposed liability under the rule,¹⁴³ no case has involved a study abroad program. If program-related activities in a dangerous country were held to be inherently dangerous because material risks could not be eliminated through the exercise of reasonable care, the provider might nevertheless avoid liability to a student based on a defense of primary assumption of the risk.¹⁴⁴ That is, it could be argued, with legal plausibility, that a student's voluntary participation in a study abroad program in a dangerous country is an assumption of inherent risks. There is support for this type of argument in decided cases. Some courts have said that “the inherently dangerous activity doctrine was designed to protect third parties, not those actively involved in the dangerous activity.”¹⁴⁵ However, other courts have held that

142. RESTATEMENT (SECOND) OF TORTS § 427 cmt. b (1965) (emphasis added).

143. By far, the greater number of courts that have considered the inherently-dangerous-activity exception have found it inapplicable to the facts before them. However, several recent cases have applied the exception. *See* *McMillian v. United States*, 112 F.3d 1040, 1047 (9th Cir. 1997) (holding that activity of felling all of the trees in a right-of-way corridor was inherently dangerous); *Maldonado v. Gateway Hotel Holdings, L.L.C.*, 154 S.W.3d 303, 310 (E.D. Mo. 2003) (holding that a boxing match was an inherently dangerous activity, and therefore a hotel was liable for the negligence of an independent contractor who failed to provide post-fight medical care); *Hatch v. V.P. Fair Found., Inc.*, 990 S.W.2d 126, 135–36 (Mo. Ct. App. 1999) (finding that bungee jumping was an inherently dangerous activity); *Beckman v. Butte-Silver Bow County*, 1 P.3d 348 (Mont. 2000) (holding that trenching is an inherently dangerous activity because the risks of death or serious bodily injury are well recognized and special precautions are required to prevent a cave-in that could bury a worker); *Enriquez v. Cochran*, 967 P.2d 1136, 1162 (N.M. Ct. App. 1998) (holding that felling dead trees is an inherently dangerous activity); *Pusey v. Bator*, 762 N.E.2d 968, 975 (Ohio 2002) (holding that if an employer hires independent contractor to provide armed security guards to protect property, the inherently-dangerous-work exception is triggered, and that if someone is injured by the weapon as result of a guard's negligence, the employer is vicariously liable even though the guard is an employee of the independent contractor).

144. *See generally* *Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470, 476–77 (7th Cir. 1991) (differentiating express assumption of risk, primary implied assumption of risk, and secondary implied assumption of risk). “In primary implied assumption of risk, the plaintiff assumes risks inherent in the nature of the activity” and is completely barred from recovery. *Id.* at 477. *See infra* text accompanying note 161.

145. *DeShambo v. Nielsen*, 684 N.W.2d 332, 339 (Mich. 2004) (involving an employee of independent contractor who was injured while cutting timber). *See also* *Apostal v. Oliveri Constr. Co.*, 678 N.E.2d 756, 761 (Ill. Ct. App. 1997) (stating, in the context of a similar non-

voluntary participants in inherently dangerous activities, such as logging, were not barred from recovery based on their participation, although their conduct might constitute comparative negligence that would reduce their recovery.¹⁴⁶ The application of these theories to injuries arising in connection with study abroad has yet to be charted. Obviously, there are many unanswered questions and plenty of room for dispute.¹⁴⁷ Among the numerous uncertainties is the fact that whether an activity is 'inherently dangerous' is ordinarily a question for the jury, not the court.¹⁴⁸

D. Ostensible Agency

Fourth, liability may be imposed on a program provider based on an ostensible agency theory.¹⁴⁹ Thus, even if the person is not actually an agent or employee acting within the scope of employment, a program provider might be subject to liability essentially on estoppel grounds if its conduct led the injured person (e.g., a student) to believe that the tortfeasor was acting on behalf of the provider and thereby induced reliance. This theory of liability may have considerable applicability to a foreign program where the lines of responsibility are blurred and

delegable duty argument, that the "nondelegable duty . . . runs to third parties, not to employees of the independent contractor").

146. See, e.g., *McMillian v. United States*, 112 F.3d 1040, 1047 (9th Cir. 1997) (reducing the damages awarded to a logging contractor's employee based on the employee's comparative negligence).

147. See *Dexter v. Town of Norway*, 715 A.2d 169, 172 (Me. 1998) (holding, in a case arising from a fire, that the defendant might be liable for negligent selection of an independent contractor, but "[w]e are far less certain whether and under what circumstances we would recognize the doctrine variously described as involving 'a peculiar unreasonable risk' (section 413), 'a peculiar risk' (section 416) or 'a special danger' (section 427)").

148. See *Fry v. Diamond Constr., Inc.*, 659 A.2d 241, 249 (D.C. 1995) (holding, in a suit for personal injuries sustained when the plaintiff fell off of a ladder that had been placed on a scaffold, that for purposes of the rule, an employer is liable for injuries caused by negligence of independent contractor if the activity is inherently dangerous. The existence of danger and knowledge of it by employer are normally questions of fact for jury). See also *Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282, 286 (Colo. 1992) (finding that it was for the jury to determine whether it was inherently dangerous for a charter airline to fly passengers in winter to the mountains in an unpressurized plane that was uncertified for flights into icy conditions); *Bohme, Inc. v. Sprint Int'l Commc'n*, 686 N.E.2d 300, 309 (Ohio Ct. App. 1996) (holding that a fact issue existed as to whether installation and maintenance work by the defendant's independent contractors on a ten ton rooftop air conditioning unit was inherently dangerous). But see *Hatch*, 990 S.W.2d at 135-36 ("To initially determine whether an activity is inherently dangerous, the trial judge should begin by ascertaining the nature of the activity and the manner in which the activity is ordinarily performed. If after considering these factors the trial court concludes the activity does not involve some peculiar risk of harm, then the activity is not inherently dangerous as a matter of law. If the trial court does not so find, then the question should be submitted to the jury.") (citations omitted).

149. See generally RESTATEMENT (SECOND) OF AGENCY § 267 (1958) (providing that a party asserting ostensible agency must demonstrate that the principal, by its conduct, caused the party to reasonably believe that the putative agent was an employee or agent of the principal, and that the party justifiably relied on the appearance of the agency relationship). See also *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 949 (Tex. 1998) (applying an ostensible-agency analysis to a claim based on the conduct of a physician staffing a hospital emergency room).

shifting. A visiting faculty member hired only to teach a course may be enlisted to lead a field trip to the local courts or to drive an ill student to the hospital. If the conduct results in an accidental injury, it will probably be no defense for the program provider to argue that the faculty member was not hired or paid to perform that job. If the program's information booklet for students lists white-water rafting companies as an available form of recreation, or if fliers for hang-gliding vendors are posted in the student dormitory, it may be legally advantageous to inform students that those enterprises operate independently, not as agents for the program provider or with the provider's endorsement.¹⁵⁰

VI. NEGLIGENCE

A. Reasonable Care and Foreseeability

At the beginning of the twenty-first century, the general rule in American tort law is that all persons are required to exercise reasonable care in their activities to protect other persons from physical harm.¹⁵¹ The duty of reasonable care means that an actor must employ cost-effective measures to prevent injuries.¹⁵² On the home campus this may mean that a college or university will be held liable for "failure to install simple, inexpensive locks or latches on the shower doors."¹⁵³ Similarly, at both home and foreign campuses, a program provider may have a duty to disclose a variety of risks which are known to the provider but unlikely to be discovered by students,¹⁵⁴ assuming it is inexpensive and useful for the provider

150. *But see* McClure v. Fairfield Univ., 35 Conn. L. Rptr. 169, 169 (Super. Ct. 2003) (finding that a university had assumed a duty to provide safe transportation between the campus and a beach where drinking took place. The court noted that "the university's providing information about the beach area housing in the student binder was an imprimatur").

151. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 7 (Proposed Final Draft No. 1, 2005) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."); *see generally* Vincent R. Johnson, *Tort Law in America at the Beginning of the 21st Century*, 1 RENMIN U. CHINA L. REV. 237, 241 (2000) (discussing the general rule).

152. *See generally* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (stating that if the probability of harm is called P, the gravity of the threatened injury or loss called L, and the burden of preventing the loss called B, "liability depends upon whether B is less than L multiplied by P," in other words, whether B is less than PL); JOHNSON & GUNN, *supra* note 33, at 250 (stating that the $B < L \times P$ formula "suggests . . . that if the chance of an accident is high, it makes more sense to devote resources to safety than if the chance of an accident is low, other things being equal. . . . And the formula teaches that, other things being equal, resources spent to prevent accidents that threaten serious injury are better spent than if they had gone to reduce minor scrapes").

153. *Shivers v. Univ. of Cincinnati*, No. 2000-02461, 2005 WL 517450, at *4 (Ohio Ct. Cl. Jan. 6, 2005) (holding that a university's failure to install locks or latches was a breach of the duty of care that proximately caused plaintiff's injury).

154. *Cf. Sy v. Bd. of Trs. of Cal. State Univ.*, No. B172235, 2005 WL 950006, at *4 (Cal. Ct. App. Apr. 26, 2005) (finding a university not liable for failure to warn because while "[h]idden or obscured dangers of property may require the responsible landowner to warn of those conditions . . . there are no allegations that the presence of trains on this track was hidden or obscured").

to give such warning.¹⁵⁵ For example, if the director of a foreign program knows that in recent years students have been harassed or molested while walking in a certain area near the program's dormitories, reasonable care may require disclosure of that information.¹⁵⁶

155. See Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability*, 57 S.C. L. REV. 255, 276 (2005) ("In addressing questions of duty in unsettled areas of the law, courts often ask whether imposition of duty makes sense as a matter of public policy. They consider, for example, whether obligating the defendant to exercise care would tend to minimize harm to potential plaintiffs without being unduly burdensome to the defendant or disruptive to the community."); see, e.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976) (holding that where a patient confided an intention to kill another student to a psychologist employed by the university hospital, and the psychologist referred the matter to police but did not actually warn the other student, who was then killed, the complaint of the victim's parents stated a cause of action against the university. "If the exercise of reasonable care to protect the threatened victim requires the therapist to warn the endangered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment"); *Nova Se. Univ., Inc. v. Gross*, 758 So. 2d 86, 87 (Fla. 2000) (stating that a "university may be found liable in tort where it assigns a student to an internship site which it knows to be unreasonably dangerous but gives no warning, or inadequate warning"); *Stanton v. Univ. of Me.*, 773 A.2d 1045 (Me. 2001) (holding that a university owed a duty to a seventeen-year-old student-athlete, as a business invitee attending a pre-season soccer program, to advise the student of steps she could take to improve her personal safety; the student was sexually assaulted by a companion she had admitted into her dormitory); see also *Mostert v. CBL & Assoc.*, 741 P.2d 1090, 1094-95 (Wyo. 1987) (recognizing a duty to warn theater patrons of off-premises dangers posed by a developing storm of great severity because, among other things, the "burden of passing [that] superior knowledge on to patrons regarding the flood appears to be minimal"). Under the law of deceit, there is a similar duty to reveal facts not reasonably discoverable by the plaintiff, for otherwise the plaintiff would "simply be relegated to making a potentially bad decision without access to material information." Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 539-43 (2004).

156. The issue here is complex—at least when viewed from a premises-liability perspective. A business has a duty to protect business invitees from hazards on property over which the business exercises control. See *supra* note 112. That rule may apply to a foreign campus over which a program exercises control. The question would then be whether there was a duty to warn of dangers in proximity to that foreign premises. Some cases—but certainly not all—say that a duty to warn invitees of dangers extends to hazards outside the premises which the invitee may foreseeably encounter. Compare *Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 772 (Ind. Ct. App. 1986) (stating that a duty of reasonable care extends "beyond the business premises when it is reasonable for the invitees to believe the invitor controls premises adjacent to his own or where the invitor knows his invitees customarily use the adjacent premises in connection with the invitation"), and *Mulraney v. Auletto's Catering*, 680 A.2d 793, 795 (N.J. 1996) (recognizing a duty to protect customers from dangers in an area neither owned nor controlled by the proprietor, but which the proprietor knew or should have known its customers would use for parking), with *Frampton v. Hutcherson*, 784 N.E.2d 993, 997 (Ind. Ct. App. 2003) (holding that homeowners were not liable for negligence to a pedestrian who was injured on a sidewalk in front of their home because the sidewalk was owned by the city), *Rhudy v. Bottlecaps Inc.*, 830 A.2d 402, 406-07 (Del. 2003) (holding that a business that advertised the availability of nearby free public parking was not liable for harm caused at that location by a robber because the business did not control the lot or increase the risk of harm to patrons parking there), and *Kuzmicz v. Ivy Hill Park Apts., Inc.*, 688 A.2d 1018, 1024 (N.J. 1997) (holding that a landlord did not owe a duty to tenants to protect them from criminal assaults on a city-owned vacant lot located between the complex and a shopping center, either by warning them of the risks of assault on the lot, or by

There is generally no duty to warn college or university students of known or obvious dangers, such as a pothole in a parking lot,¹⁵⁷ snow or ice on exterior steps,¹⁵⁸ discovered water in a hallway,¹⁵⁹ or the risk of falling from a high bluff.¹⁶⁰ This is because it is reasonable to expect persons who have reached maturity to guard against risks that are already known or obvious. Similarly, there is no duty to protect others against risks that are such an inherent and foreseeable part of an activity that they are deemed to be assumed by voluntary participation.¹⁶¹ A student who engages in rock climbing while participating in an educational program need not be told of the risk of falling, since “[f]alling, whether because of one’s own slip, a co-climber’s stumble, or an anchor system giving way, is the very risk inherent in the sport of mountain climbing and cannot

making more exhaustive efforts to mend the fence that separated the complex from the lot). *See also* Udy v. Calvary Corp., 780 P.2d 1055, 1062 (Ariz. Ct. App. 1989) (finding that a landlord could be liable for injuries to a child which occurred beyond the boundaries of the landlord’s property where the child’s parents had repeatedly asked the landlord to erect a fence to keep their small children off a busy street); Walton v. Spindle, 484 N.E.2d 469, 472–73 (Ill. App. Ct. 1985) (holding a tavern owner not liable for injuries sustained outside the tavern in a fight which began in the tavern).

157. *See* White v. Univ. of Toledo, No. 2004-03772-AD, 2004 WL 2804875, at *2 (Ohio Ct. Cl. Aug. 24, 2004) (finding that a student failed to establish that a pothole in a university parking lot was not open, obvious, and readily discernable, and therefore could not recover in a premises liability action).

158. *See* Cory v. Davenport Coll. of Bus., 649 N.W.2d 392, 394 (Mich. Ct. App. 2002) (holding that snowy and icy steps leading up to a dormitory constitutes an open and obvious danger); Lee v. Univ. of Akron, No. 2003-03132-AD, 2003 WL 21694740, at *2 (Ohio Ct. Cl. July 11, 2003) (finding that no action for negligence was stated because the plaintiff “should have realized the steps would have been slippery from a natural accumulation of falling snow and climatic conditions”).

159. *See* Conrad v. Miami Univ., No. 2002-10364-AD, 2003 WL 1985214, at *2 (Ohio Ct. Cl. Apr. 9, 2003) (finding that two inches of water in a basement hallway was an open and obvious danger); Underwood v. Univ. of Akron, No. 2003-01814-AD, 2003 WL 21540668, at *2 (Ohio Ct. Cl. June 18, 2003) (finding no liability because the water from melted snow was known to the plaintiff).

160. *See* Anderson v. Principia Corp., 202 F. Supp. 2d 950, 960 (E.D. Mo. 2001) (recognizing the open and obvious danger rule and finding that the forgetfulness or distraction exception did not apply in a suit against a college where a student’s fall from a bluff while he was intoxicated resulted in his death).

161. *See* Saville v. Sierra Coll., 36 Cal. Rptr. 3d 515, 522 (Ct. App. 2005) (holding that a negligence claim was barred by the doctrine of primary assumption of the risk, which applied to arrest and control techniques that were part of a peace officer training class at a community college). *Compare* Torres v. Univ. of Mass., No. 04-2377, 2005 WL 3629285, at *2 (Mass. Super. Ct. Dec. 19, 2005) (holding that while a “majority of jurisdictions which have considered this issue have concluded that personal injury cases arising out of an athletic event must be predicated on reckless disregard of safety,” that rule did not apply in a case involving injuries sustained during cheerleading practice because the “plaintiff was not engaged in competition at the time of her accident, and . . . the supervision she advocates would not interfere with the activity she was engaged in, even had it been at a game or a cheerleading competition rather than a practice”), *with* Vistad v. Bd. of Regents of Univ. of Minn., No. A04-2161, 2005 WL 1514633, at *4 (Minn. Ct. App. June 28, 2005) (finding that a cheerleader was barred from recovering for injuries resulting from a fall by primary assumption of risk).

be completely eliminated without destroying the sport itself.”¹⁶²

Foreseeability of harm is the single most important concept in the law of negligence.¹⁶³ Absent foreseeability of injury, there is no liability for failure to exercise care. In cases against colleges and universities, the decisions often turn on a factual determination as to whether the risk in question—such as an attack by an intruder¹⁶⁴—was or was not foreseeable.

Of course, the question is not whether someone thinking about an unlikely or far-fetched set of events could have foreseen a risk of harm. (If that were the standard, persons who read novels or watch TV or movies would be able to “foresee” everything and have endless duties under tort law.) Rather, the question is whether a reasonable person familiar with the circumstances would have anticipated a risk of such “weight and moment”¹⁶⁵ as to have fair notice that precautions were required. As courts sometimes say, the question is not whether harm was “possible,” but whether it was “probable”¹⁶⁶—“probable” not in the sense of more likely than not to occur,¹⁶⁷ but in the sense of being sufficiently likely and important as to require evasive action. One recent case found that the mere possibility that one college roommate might “theoretically” cause harm to another was insufficient to support a finding that the university was negligent in assigning the students to live together.¹⁶⁸

162. *Regents of Univ. of Cal. v. Superior Court*, 48 Cal. Rptr. 2d 922, 925–26 (Ct. App. 1996) (holding that a university was not liable, under the doctrine of primary assumption of risk, for the death of a student in rock-climbing class).

163. See generally W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 921 (2005) (“Foreseeability of a risk of injury has for centuries rested at the heart of court determinations of whether a defendant breached its duty of care.”); Edward von Gerichten, *Tort Litigation in Higher Education*, 26 J.C. & U.L. 245, 266 (1999) (“[F]oreseeability of harm is a major issue that will be looked at by the courts in determining whether an institution owes a duty to the student and . . . courts are willing to extend this duty even when the harm occurs at locations off-campus, if the activity being engaged in by the student was directly and causally related to her academic program.”).

164. See, e.g., *Rogers v. Del. State Univ.*, No. Civ. A.03C-03-218-PLA, 2005 WL 246, at *6 (Del. Super. Ct. Oct. 5, 2005) (holding that a university could not be liable for failure to prevent an attack that was “planned as an ambush and could not have been reasonably foreseen”); *Agnew Scott Coll., Inc. v. Clark*, 616 S.E.2d 468, 471 (Ga. Ct. App. 2005) (“[G]eneral crime statistics and student concerns about walking alone in a parking lot at night [do not] create an issue of fact regarding the foreseeability of a random attack on a student in broad daylight in the parking lot.”); *Kleisch v. Cleveland State Univ.*, No. 2003-05452, 2005 WL 663214, at *3 (Ohio Ct. Cl. Feb. 22, 2005) (holding that a university had no duty to protect student from being raped in a classroom on a weekday morning during final examinations because the rape was not foreseeable since university was unaware of the rapist’s presence or motives until after the attack).

165. *Gulf Refining Co. v. Williams*, 185 So. 234, 236 (Miss. 1938) (stating that negligence requires a “likelihood [of harm that] is of such appreciable weight and moment as to induce . . . action to avoid it on the part of a person of a reasonably prudent mind”).

166. See, e.g., *Nussbaum v. Lacopo*, 265 N.E.2d 762, 767 (N.Y. 1970) (holding that the fact that a golfing accident was “merely possible” was not enough to prove negligence, which must be “probable”).

167. *Gulf Refining Co.*, 185 So. at 235 (“[I]t is not necessary that the chances that a damage will result shall be greater than the chances that no damage will occur.”).

168. See *Rhaney v. Univ. Md. E. Shore*, 880 A.2d 357, 366 n.10 (Md. 2005) (stating that

Determining whether there is sufficiently foreseeable risk of harm to impose liability for lack of care is a fact-specific task. The assessment requires consideration of the magnitude of the risk, the likelihood that harm will occur, the type of damage that might be caused, and the availability of options for avoiding the risk of harm.¹⁶⁹ For liability to arise, a particular risk must be so clear and probable that a reasonable person would be on notice of what needed to be prevented and have some idea of what to do. The mere fact that Americans traveling abroad might be harmed somewhere in the world by extremists is such a vague risk that it probably imposes no particular duty on any foreign study program. In contrast, notice of serious danger to a limited class of persons may trigger a duty to exercise care.¹⁷⁰ If a terrorist group targets Americans studying in a particular city, a provider operating a program at that location must exercise a degree of care commensurate with the gravity and specificity of the threat. In a given case, the duty of reasonable care may entail the preparation of contingency plans for evacuating students or may even preclude the provider from sending additional students to that site as long as the threat persists.¹⁷¹

In some cases, liability depends on whether there have been prior similar incidents of harm.¹⁷² If, absent such events, the risk would not have been

“[o]ne could argue theoretically that some type of harm inevitably would fall upon any future roommate” of a student who had been previously disciplined for fighting, but that “foreseeability is not nearly wide enough to include a *possible* result, but deals more with the *probability* of that result. Without more than the one incident in this record, which involved multiple people in a social setting, . . . the probability of Clark assaulting his prospective roommate at the time [the university assigned them] as roommates was not high,” and therefore there was no basis for holding the university liable for negligence).

169. See generally RESTATEMENT (SECOND) OF TORTS § 291 cmt. d (1965) (stating that “[t]he magnitude of the risk is to be compared with what the law regards as the utility of the act”).

170. See *Bd. of Trs. of Ball State Univ. v. Strain*, 771 N.E.2d 78 (Ind. Ct. App. 2002) (holding that the evidence supported a finding that a state university was negligent in failing to supply a portable dance floor for a performance at a high school because the evidence showed that the university knew that the floor at the high school auditorium was uneven and subject to splintering).

171. See *Watson*, *supra* note 1, at 10 (discussing threats against American colleges and universities operating programs in Florence during the Gulf War); *Hoye*, *supra* note 20, at 11 (noting a threat of international terrorism that prompted one university to withdraw students from Israel).

172. In a recent case, a court stated:

In determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, the court must inquire into the location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question. While the prior criminal activity must be substantially similar to the particular crime in question, that does not mean identical. What is required is that the prior incident be sufficient to attract the [landowner’s] attention to the dangerous condition which resulted in the litigated incident.

Agnes Scott Coll., Inc. v. Clark, 616 S.E.2d 468, 470–71 (Ga. Ct. App. 2005) (citing *Sturbridge Partners v. Walter*, 482 S.E.2d 339, 341 (Ga. 1997)). See also *Rogers v. Del. State Univ.*, No. Civ. A. 03C-218-PLA, 2005 WL 2462271, at *6 (Del. Super. Ct. Oct. 5, 2005) (“Evidence of only one prior criminal incident, irrespective of a higher crime rate in the area of the property, is insufficient as a matter of law with regard to the issue of foreseeability.”).

reasonably foreseeable, liability may depend on such incidents.¹⁷³ One court recently held that the lack of evidence of similar criminal incidents involving physical attacks on persons in a college parking lot meant that the kidnapping of a student from the lot was not reasonably foreseeable.¹⁷⁴ The college was therefore not liable for allegedly negligent failure to keep the college premises safe. However, the trigger for liability is whether the harm was foreseeable, not whether there were similar incidents in the past. If it is foreseeable that a student may fall from a window with a low sill and no safety bar, an action for negligence will lie even if no one fell from the window before.¹⁷⁵

Constructive notice of a danger will establish the basis for liability, if the peril existed long enough that it should have been discovered and addressed through the exercise of reasonable care.¹⁷⁶ There is no hard and fast rule as to how long is long enough. In one recent case, a student's slip-and-fall claim against a college failed because the allegedly dangerous condition of a rug existed only for "a short time" and had not actually been discovered.¹⁷⁷

173. See *Fleming v. Lorain Cmty. Coll.*, No. 04CA008613, 2005 WL 1763609, at *3 (Ohio Ct. App. July 27, 2005) (holding, in an action where a student was injured when the elevator she was entering dropped, that a statement in the student's summary judgment motion that an unidentified maintenance worker told her "they had problems with the elevators all the time" was insufficient to create a triable issue as to whether the college knew of problems with the elevator, because the student presented no evidence that the worker was responsible for elevator or was referring to misleveling problems in particular).

174. *Agnes Scott Coll., Inc.*, 616 S.E.2d at 470.

175. See *Escobar v. Univ. of S. Cal.*, No. B166522, 2004 WL 2094602, at *17 (Cal. Ct. App. Sept. 21, 2004) (finding that there was a triable issue of fact as to whether a university maintained property in a dangerous condition that caused harm to a student who fell from a fourth floor window). Addressing the significance to the fact that no one previously had fallen from the building, which was erected decades earlier, the Escobar court explained:

In the area of landowner liability for third party crime, prior similar incidents play an important role in determining whether injury was foreseeable In cases involving liability for a dangerous condition of property, however, the existence or non-existence of prior similar incidents do not play this crucial role. . . . If the condition of property is such that the resulting danger can be identified by simple observation, the accident is foreseeable for purposes of duty analysis, and the question becomes whether the landowner took reasonable precautions in light of the observable danger presented.

Id. at *7 (citations omitted).

176. See, e.g., *Anjou v. Boston Elevated Ry. Co.*, 94 N.E. 386, 386 (Mass. 1911) (holding that the discolored condition of a banana peel provided constructive notice of the danger); *Mena v. Regents of Univ. of Cal.*, No. G030447, 2004 WL 352707, at *5 (Cal. Ct. App. Feb. 26, 2004) (holding that there was "ample evidence the accumulated bird droppings had constituted a safety hazard on defendant's property long enough for the jury to consider it a liability factor"). Cf. *Roddy v. Columbus State Cmty. Coll.*, No. 20094-03608, 2005 WL 894888, at *2 (Ohio Ct. Cl. Mar. 22, 2005) (holding that a college was not liable for injuries a student sustained in a fall as a result of water on a no-slip mat because there was no evidence the college had actual or constructive knowledge of accumulated water, which was an open and obvious condition that could have been easily avoided).

177. *Holliman v. Columbus State Cmty. Coll.*, No. 2003-05470, 2004 WL 821662, at *2 (Ohio Ct. Cl. Apr. 13, 2004) (denying recovery). See also *Deal v. State*, No. A-01-07, 2003 WL 717672, at *8 (Neb. Ct. App. Mar. 4, 2003) (finding no liability for slip-and-fall on tracked-in water where there was "simply no evidence as to how long the puddle of water had existed . . . or

Some risks are foreseeable simply because of the nature of an enterprise. If the design of a university baseball park makes it foreseeable that foul balls will strike patrons in the ticket line, the university may be held liable even if it produces evidence that no accident of that type previously occurred.¹⁷⁸

Of course, duty and breach of duty are only part of what a plaintiff must establish in a negligence action. Evidence that the breach caused damage is required. Throwing a book bag in a classroom filled with students may be careless,¹⁷⁹ but unless it strikes a student and causes harm, there is no liability.

B. The Importance of Context

Precisely what must be done to comply with the duty of reasonable care will vary greatly depending on the age and maturity of the participants in the program, as well as the nature of the program itself.¹⁸⁰ Persons who have reached the age of majority may, to a very large extent, be treated as able-bodied adults, capable of protecting their own interests. Courts have held that the doctrine of *in loco parentis*¹⁸¹ is obsolete with respect to college and university students.¹⁸² In contrast, there is less reason to indulge assumptions of self-sufficiency in the case of participants who are minors.¹⁸³ A useful illustration concerns social host liability for providing alcohol.

Most American states hold that a person who gives alcohol to an adult is not liable for harm that the recipient causes, either to another person or to himself or herself, as a result of intoxication.¹⁸⁴ The assumption, in the eyes of the law, is

that the employees . . . had actual or constructive knowledge of the condition”).

178. See *Reider v. State ex rel. La. Bd. of Trs.*, 897 So. 2d 893, 896–97 (La. Ct. App. 2005) (affirming a judgment against the university).

179. *Parsons v. Wash. State Cmty. Coll.*, No. 2004-04825, 2005 WL 2711216, at *3 (Ohio Ct. Cl. Sept. 29, 2005).

180. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. 1 (Proposed Final Draft No. 1, 2005) (“[B]ecause of the wide range of students to which it is applicable, what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary school pupils is substantially different from reasonable care for college students.”).

181. *In loco parentis* is a Latin phrase meaning “in the place of a parent.” BLACK’S LAW DICTIONARY 803 (8th ed. 2004).

182. See, e.g., *Furek v. Univ. of Del.*, 594 A.2d 506, 516–17 (Del. 1991) (“The concept of university control based on the doctrine of *in loco parentis* has all but disappeared in the face of the realities of modern college life where students ‘are now regarded as adults in almost every phase of community life.’” (citing *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979))); *McNeil v. Wagner Coll.*, 667 N.Y.S.2d 398 (App. Div. 1998) (stating that “New York has rejected the doctrine of *in loco parentis* at the college level”).

183. See *Stanton v. Univ. of Me.*, 773 A.2d 1045, 1050 (Me. 2001) (noting that “young people, especially young women, . . . may not be fully conscious of the dangers that are present” and holding that a university owed a duty to a 17-year-old female student to warn her of the danger of sexual assault and advise her of steps she could take to improve her personal safety).

184. See *Cole v. Rush*, 289 P.2d 450, 457 (Cal. 1955) (declining to recognize social host liability); *D’Amico v. Christie*, 518 N.E.2d 896, 899 (N.Y. 1987) (holding that an employees’ association, which provided free beer at a picnic, was not liable under common law for injuries resulting from employee’s intoxication).

that in such cases, the recipient is an “able-bodied”¹⁸⁵ adult who can make decisions about how much to drink. However, many states also hold that a social host who gives alcohol to a minor is liable for harm that the intoxicated minor inflicts on another individual or suffers personally.¹⁸⁶ The director of a foreign educational program who encourages American law school students (who are typically age twenty-one or older) to attend a guest lecture at the local gasthaus by offering free beer and pretzels probably is not creating a risk of social host liability for the program provider. However, another director who makes the same offer to students below the age of twenty-one may be venturing into uncertain legal territory.¹⁸⁷ Even if consumption of alcohol by students that age is lawful at the foreign location, there is less reason for an American court to hold that the donor should escape liability for harm resulting from intoxication because the recipient, who was below the age of twenty-one, was an “able-bodied” adult.¹⁸⁸

Similar issues may arise with respect to medical care for program participants. Suppose that a student becomes ill at the site of the foreign program and needs to be hospitalized. May the director of the program defer to the student’s instruction that his or her parents are not to be notified?¹⁸⁹ It is easier to say that the director

185. See *Cole*, 289 P.2d at 455 (holding that a patron’s surviving widow and minor children could not recover for alleged negligent furnishing of intoxicating liquor to the patron, who was an “able-bodied man”).

186. See *Ely v. Murphy*, 540 A.2d 54, 58 (Conn. 1988) (holding that a minor’s consumption of alcohol was not, as matter of law, an intervening cause that would insulate a social host or other provider of liquor from liability for ensuing injury to the minor or a third party); *Congini v. Portersville Valve Co.*, 470 A.2d 515, 518 (Pa. 1983) (holding that social-host liability attaches in cases involving the negligent furnishing of alcoholic beverages to minors, but not to persons of drinking age); *Langle v. Kurkul*, 510 A.2d 1301, 1306 (Vt. 1986) (holding that a host may be liable for furnishing alcoholic beverages to a visibly intoxicated person who will drive an automobile or to a minor).

187. See generally *Lake*, *supra* note 32, at 626–47 (discussing college and university liability for alcohol-related injuries). The challenges posed by student consumption of alcohol are not new in American higher education. In 1722, the rulebook at Yale University provided that “[i]f any student go into any tavern . . . he shall be obliged to confess his fault and be admonished and for ye second offense of ye same kind be Degraded and for ye third be expelled.” Steve Olson, *Half Full and Half Empty*, 69 YALE ALMUNI MAG. 2, 42, 48 (Nov.–Dec. 2005).

188. See *Congini*, 470 A.2d at 518 (holding that a host was negligent *per se* in serving alcohol to the point of intoxication to person less than twenty-one years of age and that an action based on such negligence could be brought by the minor, not only by a third party). In *Congini*, the court found that although there is “no common law liability on the part of a social host for the service of intoxicants to his adult guests” that rule is based on the assumption that the recipient is an “ordinary able bodied man.” *Id.* at 517. “However, our legislature has made a legislative judgment that persons under twenty-one years of age are incompetent to handle alcohol” and this legislative judgment compels a different result involving provision of alcohol to a minor “for here we are not dealing with ordinary able bodied men. . . . [W]e are confronted with persons who are, at least in the eyes of the law, incompetent to handle the affects of alcohol.” *Id.*

189. The Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g (2000 & Supp. III 2003) imposes important limitations on dissemination of student information. It is not clear that FERPA would apply to this type of student information. See *Doe v. Knox County Bd. of Educ.*, 918 F. Supp. 181 (E.D. Ky. 1996) (holding that § 1983 would support FERPA claims in an action where the educational records and medical condition of a student were disclosed to a newspaper and printed in an article); *Commonwealth v. Buccella*, 751 N.E.2d

has acted reasonably in acceding to that direction if the student has reached the age of majority.

C. Customary Practices

In general, conformance with customary practices in a calling or industry raises an inference of reasonableness (non-negligence) and departure from custom raises an inference of unreasonableness (negligence).¹⁹⁰ Therefore, a foreign program that does what similar other foreign programs do (i.e., does what is customary) ordinarily has a reduced risk of liability based on following those practices.¹⁹¹

For example, suppose that program providers operating a particular type of program (e.g., on-site study for American law students conducted at a major university in a large western European city) customarily do not staff the foreign program office on weekends. The rule on custom means that, absent unusual facts requiring special precautions, it will be hard to fault the provider for not having weekend staff hours to address student needs. Conversely, if by reason of the age of the student participants, the difficulty of reaching the host country, or of moving between or within foreign cities, other similar programs customarily provide chaperoned transportation for students, it will be easier to argue that a program that fails to do so has fallen below the standard of care.¹⁹²

The rule relating to custom means that it is important for a program provider to be aware of, and act consistently with, the current “state of the art” in administering foreign programs. Moreover, if customary practices have been reduced to writing (e.g., as part of the standards that guide the accreditation of

373, 388 n.3 (Mass. 2001) (Marshall, C.J., concurring) (stating that “FERPA protections do not extend to . . . [certain] records of medical or psychological treatment” (citing 34 C.F.R. § 99.3 (2001))). See generally Ethan M. Rosenzweig, Comment, *Please Don't Tell: The Question of Confidentiality in Student Disciplinary Records Under FERPA and the Crime Awareness and Campus Security Act*, 51 EMORY L.J. 447, 451–54 (2002) (discussing the history and purpose of FERPA).

190. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 13 (Tentative Draft No. 1, 2001) (discussing custom); RESTATEMENT (SECOND) OF TORTS § 295A cmt. b (1965) (“Evidence of . . . custom is admissible, and is relevant, as indicating a composite judgment as to the risks of the situation and the precautions required to meet them, as well as the feasibility of such precautions, the difficulty of any change in accepted methods, the actor’s opportunity to learn what is called for, and the justifiable expectation of others that he will do what is usual, as well as the justifiable expectation of the actor that others will do the same. If the actor does what others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct; and if he does not do what others do, there is a possible inference that he is not so conforming.”).

191. But see RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (1965) (discussing when custom is not controlling).

192. In *Bloss v. University of Minnesota Board of Regents*, 590 N.W.2d 661 (Minn. Ct. App. 1999), a student who was raped in Mexico by a taxi driver alleged that the state university which sponsored the cultural immersion program was negligent in failing to provide transportation between the home of the student’s host family and the city where the foreign program was located two-and-a-half miles away. *Id.* at 662–63. The appellate court confined its review to the issue of discretionary immunity, and concluded that decisions relating to whether transportation should be provided for program participants were immune from judicial review. *Id.* at 665–66.

programs operating in foreign locations¹⁹³), it is important for those practices to be observed, unless there is good reason for variation or unless the norms are merely aspirational.¹⁹⁴ Of course, the standard for legal liability is not what is customary, but what is reasonable.¹⁹⁵ A widespread customary practice (e.g., jaywalking in busy traffic or talking on a cell phone while driving) may be unduly dangerous, in which case conformance with custom does nothing to reduce the risk of liability.¹⁹⁶

D. Voluntary Assumption of Duty

The law continues to draw an important distinction between doing something badly (misfeasance) and not doing it at all (nonfeasance).¹⁹⁷ The former often gives rise to liability because one who acts must act reasonably, but the latter may go unpunished on the ground that the defendant had no duty to act to protect the interests of the plaintiff.¹⁹⁸ In two recent cases, for example, institutions of higher education, which had allegedly failed to protect students from harm caused by third persons, were found not liable for negligence. In one case, a college was deemed to have no duty to protect a student from the negligence of an independently operated flight training school.¹⁹⁹ In the other, a university was

193. See, e.g., SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, AMERICAN BAR ASS'N, FOREIGN SUMMER PROGRAMS—REVISED CRITERIA 6 (2003), available at <http://www.abanet.org/legaled/accreditation/foreignprogramtf/foreignsummerprogramscriteria.doc> (“As part of the registration materials for the program, the school shall supply the U.S. State Department Consular Information Sheet for the country(ies) in which the program will be conducted; ‘Areas of Instability’ must be included. If the Consular Information Sheet is revised during a program to announce an ‘Area of Instability’ in the region in which the program is being conducted, the updated information must be distributed promptly to students.”). See also NAFSA: ASS'N FOR INT'L EDUCATORS, RESPONSIBLE STUDY ABROAD: GOOD PRACTICES FOR HEALTH AND SAFETY, available at <http://www.secussa.nafsa.org/safetyabroad/goodpractices2003.html>.

194. See *Varner v. District of Columbia*, 891 A.2d 260, 272 (D.C. 2006) (stating that “[a]spirational practices do not establish the standard of care” and “[t]o hold otherwise would create the perverse incentive for [universities and their administrators] to write [their manuals] in such a manner as to impose minimal duties upon [universities] in order to limit civil liability” (quoting *Clark v. District of Columbia*, 708 A.2d 632, 636 (D.C. 1997))).

195. See RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (1965) (“No group of individuals and no industry or trade can be permitted, by adopting careless and slipshod methods to save time, effort, or money, to set its own uncontrolled standard at the expense of the rest of the community. If the only test is to be what has always been done, no one will ever have any great incentive to make any progress in the direction of safety.”).

196. See *id.* (stating that “whenever the particular circumstances, the risk, or other elements in the case are such that a reasonable man would not conform to the custom, the actor may be found negligent in conforming to it; and whenever a reasonable man would depart from the custom, the actor may be found not to be negligent in so departing”).

197. See Vincent R. Johnson & Claire G. Hargrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILL. L. REV. 311, 311 n.1 (2006) (discussing misfeasance and nonfeasance).

198. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 37 (Proposed Final Draft No. 1, 2005) (stating general rule of no liability with respect to risks not created by the actor).

199. See *Ingato v. Beisel*, No. Civ. A. 03C05087SCD, 2005 WL 578814, at *1 (Del. Super.

held to have no duty to protect one student from injuries sustained while riding in the vehicle of a second sleep-deprived student.²⁰⁰

The new Restatement of Torts expressly recognizes that there is a special relationship between a school and a student which imposes on the school a duty to act to protect the student from harm.²⁰¹ Case law raises serious doubts as to whether this rule applies to students in higher education.²⁰² However, the Restatement commentary suggests that it does by noting that “what constitutes reasonable care is contextual—the extent and type of supervision required of young elementary school pupils is substantially different from reasonable care for college students.”²⁰³

In many instances, such as those involving premises liability claims, it may make little difference whether the student-school relationship is regarded as “special.” The student will qualify as a business invitee²⁰⁴ or a tenant²⁰⁵ and the

Ct. Feb. 28, 2005) (finding no duty despite the fact that the college had a degree requirement which necessitated that services be purchased from such a school).

200. See *Slone v. Univ. of Cincinnati*, No. 2000-02780, 2005 WL 2710720, at *2 (Ohio Ct. Cl. Oct. 13, 2005) (finding no duty).

201. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40(b)(5) (Proposed Final Draft No. 1, 2005) (recognizing a special relationship between a school and its students).

202. See, e.g., *Freeman v. Busch*, 349 F.3d 582, 587 (8th Cir. 2003) (“[S]ince the late 1970s, the general rule is that no special relationship exists between a college and its *own* students because a college is not an insurer of the safety of its students.”); *Schieszler v. Ferrun Coll.*, 236 F. Supp. 2d 602, 608 (W.D. Va. 2002) (“The Virginia Supreme Court has not yet addressed the issue of whether a special relationship may arise between a university or college and a student. . . . A number of cases in recent years have considered whether colleges and universities have a duty to take steps to protect students who voluntarily become intoxicated. . . . In the vast bulk of these cases, courts have concluded that no special relationship existed.”); *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 928 (N.C. Ct. App. 2001) (holding that there was a special relationship between a cheerleader and university, but cautioning that the “holding should not be interpreted as finding a special relationship to exist between a university, college, or other secondary educational institution, and every student attending the school, or even every member of a student group, club, intramural team, or organization”); *Johnson v. State*, 894 P.2d 1366, 1370 (Wash. Ct. App. 1995) (holding that “the university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties” (citing *Nero v. Kan. State Univ.*, 861 P.2d 768, 778 (Kan. 1993))). But see *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1366 (3d Cir. 1993) (holding that a college owed a student lacrosse player a duty of care based on a special relationship between the college and the student in his capacity as an intercollegiate athlete participating in a college-sponsored activity for which he had been recruited).

203. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. 1 (Proposed Final Draft No. 1, 2005). See also *id.* §40 reporters’ note to cmt. 1 (“In a number of contexts, [a duty of reasonable care] has been imposed on higher-education institutions, at least with regard to risks from conditions on the college’s property or risks created by the acts of others on the confines of college property.”).

204. See *Bell v. Univ. of V.I.*, No. Civ. 2000-0062, 2003 WL 23517144, at *4 (D.V.I. Nov. 19, 2003) (finding that a student was an invitee and that therefore a claim was stated based on allegedly negligent failure to protect the student from a dangerous professor); *Muller v. Wright State Univ.*, No. 2002-10224-AD, 2003 WL 1735499, at *2 (Ohio Ct. Cl. Mar. 19, 2003) (holding that a student on state university property was an invitee while rehearsing for a play when she was injured by descending scenery, and therefore the university owed the student a duty of reasonable

legal principles applicable to persons with that status will entitle the student-invitee or student-tenant to what amounts to reasonable care. However, in other cases, the precise nature of the student-school relationship may drive the legal analysis in a manner that may have important consequences. For example, in a recent case²⁰⁶ involving a student who was attacked in a dormitory, the court found that while the plaintiff

may have been a business invitee as a student on the [university] campus generally in its common areas, dining halls, and academic buildings, . . . upon entering his dormitory building his legal status vis à vis [the university] was regulated more specifically by the Residence Hall Agreement, and thus he was a tenant of [the university] at the time of the battery.²⁰⁷

Under the rules of premises liability, the court found there was no basis for liability because the roommate was not a dangerous or defective condition on the premises and the attack was unforeseeable.²⁰⁸

Regardless of the lens used for viewing a student's claim against a program provider—status based on a business-invitee, landlord-tenant, or school-student relationship—the duties of the provider will be limited in two important respects. First, and most obvious, at some point the matter in question will be beyond the scope of the relationship.²⁰⁹ With respect to such matters, there is no duty to act. Second, within the scope of the relationship, applicable rules do not require every form of action that might be beneficial to a student. Under one theory or another, the law will recognize certain basic duties, such as obligations to aid a student who is ill or injured,²¹⁰ to provide facilities that are not dangerous,²¹¹ and (under some

care).

205. See, e.g., *Letsinger v. Drury Coll.*, 68 S.W.3d 408, 411 (Mo. 2002) (holding that issues of material fact existed as to whether there was a landlord-tenant relationship between summer occupant of a fraternity house and the college that owned the house, which would impose a duty of care).

206. *Rhane v. Univ. Md. E. Shore*, 880 A.2d 357 (Md. 2005).

207. *Id.* at 367.

208. *Id.* at 365–66.

209. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 40 cmt. 1 (Proposed Final Draft No. 1, 2005) (stating that the duty owed by a school to its students by reason of that relationship is “only applicable to risks that occur while the student is at school or otherwise engaged in school activities”); see also *Vistad v. Bd. of Regents of Univ. of Minn.*, No. A04-2161, 2005 WL 1514633, at *4 (Minn. Ct. App. June 28, 2005) (finding no special relationship between university and student-athlete in a sports program (basketball cheerleading) for which the university “handled some administrative tasks” but “otherwise exerted minimal control . . . [and] did not provide a coach to direct practices or otherwise impose rules on the participants”).

210. Cf. RESTATEMENT (SECOND) OF TORTS § 314A (1965) (providing that an innkeeper owes its guest and a landowner owes persons who enter pursuant to a public invitation a duty “to take reasonable action (a) to protect them against unreasonable risk of physical harm, and (b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others”); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 39 (Proposed Final Draft No. 1, 2005) (discussing duty based on creating a risk of physical harm); *Vilchis v. Miami Univ. of Ohio*, 99 F. App’x 743, 745–46

circumstances) to protect students from attack by third parties.²¹² However, beyond these core obligations, there is great freedom of choice on the part of a program provider in electing what should be done. Only if a provider undertakes a particular activity is a duty of care imposed.²¹³

For example, there is generally no duty to provide off-campus transportation for college-age students.²¹⁴ However, if transportation is provided, care must be

(7th Cir. 2004) (dismissing for lack of personal jurisdiction a claim against a university based on allegedly negligent failure to respond properly to an injured diver's neck injury); *Molinari v. Tuskegee Univ.*, 339 F. Supp. 2d 1293, 1302–03 (M.D. Ala. 2004) (recognizing that tortious or even innocent involvement in an accident may give rise to a duty to render medical care, but finding it unnecessary to resolve that issue on the facts of the case).

211. See Ralph D. Mawdsley, *The Community College's Responsibility to Educate and Protect Students*, 189 EDUC. L. REP. 1, 9 (2004) (asserting that “[s]tudents are entitled to a reasonably safe campus environment”).

212. See, e.g., *Williams v. State*, 786 So. 2d 927, 932 (La. Ct. App. 2001) (holding that “a university likewise has a duty to implement reasonable measures to protect its students in dormitories from criminal acts when those acts are foreseeable”); *Johnson v. State*, 894 P.2d 1366, 1370 (Wash. Ct. App. 1995) (rejecting a university-student theory of duty, but holding that a state university student who was abducted and raped near her dormitory was entitled to invitee status, and therefore the university had a duty to use reasonable care for her safety).

213. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 42 (Proposed Final Draft No. 1, 2005) (discussing duty based on undertaking).

214. See *Stockinger v. Feather River Cmty. Coll.*, 4 Cal Rptr. 3d 385, 398 (Ct. App. 2003) (holding that a community college and instructor had no duty to ensure that students had a safe means of transportation for performing an off-campus class assignment that involved mapping and planning of a horse packing trip, and therefore were not liable for injuries sustained by college student who was thrown from back of a pickup truck during the course of the assignment, even if such harm was foreseeable). “College students are adults who, unlike children, are able to make their own responsible decisions about their own transportation.” *Id.* Addressing issues not dissimilar from those that might arise in connection with international education programs, the court wrote:

[T]he duty owed to college students such as plaintiff is different from the duty owed to elementary and high school students. . . .

. . . [A] college must be able to give its students off-campus assignments, without specifying the mode of transportation, and without being saddled with liability for accidents that occur in the process of transportation. A college instructor who gives an assignment requiring a trip to a library, or a tour of a city's unique architectural buildings, should not be required to instruct the students on the need to drive at a safe speed and to wear a seatbelt while completing the assignment. . . .

. . . .

Plaintiff argues she has shown that defendants sent junior college students out into the “wilderness” without proper instruction, did nothing to ascertain that students would be traveling in a safe manner or in proper vehicles, did nothing to check the driving records or insurance information on those who were delegated as drivers, and offered no tutelage regarding safety with respect to the operation of off-road vehicles. However, . . . defendants had no duty to do any of those things.

. . . Even assuming . . . the harm to plaintiff was foreseeable, the connection between defendants' alleged conduct (negligent failure to ensure safe travel) and plaintiff's harm was not particularly close, nor was defendants' conduct morally blameworthy, given that (1) the students were college students training to assume leadership roles in pack trips, and (2) plaintiff admitted she did not need to be told . . . that her actions were dangerous. . . . The extent of the burden on defendants, created by

exercised to protect students from travel-related injuries.²¹⁵ So too, a provider need not tell students what vaccines are recommended for persons traveling to a particular country. But if the provider does so, it must exercise care to ensure that the information is accurate and reliable.²¹⁶ There is no rule of law that obliges an international education program to require students to have physicals to ensure that they are medically fit to travel. But if the program provider elects to do so, it must exercise care in administering the tests and in collecting, retaining, and using the data that is assembled.²¹⁷ Collecting medical information from students participating in a non-strenuous educational program in a foreign country where activities are similar to life in the United States would seem to be particularly unwise. In that case, there are no special risks that would make the data especially useful, the collection of the information might expand the program provider's sphere of negligence liability, and requiring applicants to go to the trouble of arranging a medical examination might be needlessly annoying and in some cases might cause students to not participate in the program or not recommend it to others. (The latter point is important because student-to-student referrals are a major source of study abroad recruitment from one year to another.)

The point here is that duties that do not otherwise exist may be assumed when providers undertake²¹⁸ or promise to undertake²¹⁹ certain activities. A decision to engage in certain types of conduct—even if well-intended—may create a risk of liability where none would otherwise exist.²²⁰ In *McNeil v. Wagner College*,²²¹ a

a requirement that it protect every college student from reckless driving by fellow students during performance of what amounts to homework assignments, would be extraordinary, as would be the likely increase in the college district's insurance premiums.

Id. at 401–02 (citations omitted).

215. See *McClure v. Fairfield Univ.*, 35 Conn. L. Rptr. 169 (Super. Ct. 2003) (holding that by “providing information about . . . beach area housing in the student binder” and establishing a “Safe-Rides program in which student volunteers used university-owned vans to provide rides to students traveling between the campus and the beach area” at night, the university “had assumed a responsibility for the safety of students while traveling between the beach area and the university campus”).

216. See *Watson*, *supra* note 1, at 8 (describing Pepperdine University's efforts to update health-related information for countries where its students are studying).

217. Cf. *Coffee v. McDonnell-Douglas Corp.* 503 P.2d 1366 (Cal. 1972) (stating that although “[a]n employer generally owes no duty to his prospective employees to ascertain whether they are physically fit for the job they seek, . . . where he assumes such duty, he is liable if he performs it negligently,” and therefore an employer could be held liable for administering a blood test and then failing to read and disclose to the applicant the adverse results).

218. See *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM* § 42 (Proposed Final Draft No. 1, 2005) (discussing duty based on undertaking).

219. See *id.* § 42 cmt. e (discussing promises as undertakings).

220. See *Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991) (holding that a “[u]niversity's policy against hazing, like its overall commitment to provide security on its campus, . . . constituted an assumed duty which became ‘an indispensable part of the bundle of services which colleges . . . afford their students’” (quoting *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 336 (Mass. 1983))). See generally Joseph Beckham & Douglas Pearson, *Negligent Liability Issues Involving Colleges and Students: Does a Holistic Learning Environment Heighten Institutional Liability?*, 175 EDUC. L. REP. 379, 396 (2003) (stating that by “providing

student “slipped on ice and broke her ankle in a town in Austria, which she was visiting as part of an overseas program arranged by the defendant” college.²²² In a subsequent lawsuit against the college, the student argued, not implausibly, that the program administrator “assumed the duty to act as an interpreter for her in the Austrian hospital and that she suffered nerve damage due to his failure to inform her of the treating physician’s recommendation that she undergo immediate surgery.”²²³ The court found that assuming, *arguendo*, that a duty was voluntarily undertaken, the suit against the college was without merit because the student had “failed to offer evidentiary proof to support her claim that [the administrator] was told of the recommendation of immediate surgery and negligently withheld that information from her.”²²⁴ Nevertheless, the threat of assumed-duty liability is clear. The court noted that, aside from the assumed-duty theory, the defendant college “had no obligation to supervise the plaintiff’s health care following her accident.”²²⁵

In another medical-emergency case, *Fay v. Thiel College*,²²⁶ a female student became ill while participating in a study abroad program in Peru. After the student “was admitted to a medical clinic, all of the faculty supervisors and all of the other students left on a prescheduled trip that was to last several days, leaving plaintiff alone at the clinic with only a Lutheran missionary . . . to act as plaintiff’s translator.”²²⁷ The student subsequently sued the college and others for harm she sustained at the clinic as a result of unnecessary surgery and sexual abuse committed by male personnel at the clinic.²²⁸ The defendants contended “that they had no special relationship with plaintiff beyond the fact that plaintiff was a student at Thiel College.”²²⁹ They further asserted that “since there was no special relationship between the parties, defendants owed plaintiff no special duty beyond that of a reasonable standard of care, and that defendants did not violate that reasonable standard of care in leaving plaintiff alone at the Peruvian medical clinic.”²³⁰ The court rejected this argument. The college had required the student to sign a consent form that could be used in an emergency to authorize administration of an anesthetic or surgery.²³¹ The court found that under the terms of the consent form, which assured signatories that the college wanted “to observe

programs and services designed to complement classroom instruction and expand student development opportunities [such as study abroad] . . . colleges and universities may inadvertently be expanding a legal duty of care and placing themselves at increased risk for liability”).

221. 667 N.Y.S.2d 397 (App. Div. 1998).

222. *Id.* at 398.

223. *Id.*

224. *Id.* Another serious obstacle for the plaintiff was “evidence that her treating physician could speak English.” *Id.* at 398.

225. *Id.*

226. 55 Pa. D. & C.4th 353 (Ct. Com. Pl. 2001).

227. *Id.* at 355.

228. *Id.* at 354–56.

229. *Id.* at 361.

230. *Id.*

231. *Id.* at 368.

the utmost precautions for the welfare of each participant,”²³² “the faculty supervisors had a duty to ‘secure whatever treatment is deemed necessary, including the administration of an anesthetic and surgery.’”²³³ As a result, the court concluded that “Thiel College did owe plaintiff a special duty of care as a result of the special relationship that arose between Thiel College and plaintiff pursuant to the consent form”²³⁴ and could be held liable if “the lack of the presence of one or more of the faculty supervisors with plaintiff at the Peruvian medical clinic increased the risk of the male Peruvian doctors unnecessarily performing surgery on plaintiff and/or sexually assaulting plaintiff.”²³⁵ Thus, by reason of its decision to require a student to sign a consent to treatment form, the college inadvertently enlarged its exposure to liability.

Another recent case also suggests that a college or university, by its conduct, may assume a legal duty that would not otherwise exist. *Schieszler v. Ferrum College*²³⁶ involved a student suicide. The court noted that “[w]hile it is unlikely that Virginia would conclude that a special relationship exists as a matter of law between colleges and universities and their students, it might find that a special relationship exist[ed] on the particular facts alleged in this case.”²³⁷ The college was aware of the student’s emotional problems, “required him to seek anger management counseling before permitting him to return to school for a second semester,” and, after finding the student “alone in his room with bruises on his head, . . . required [the student] to sign a statement that he would not hurt himself.”²³⁸

Suppose, for example, that a foreign educational program collects from participants information listing their allergies to medications, but then misplaces the forms, with the result that the information is not available when an injured student who is unconscious needs medical care. That type of negligence is garden-variety misfeasance, and the program provider may be liable for harm caused by administration of medication to which the student was allergic. In contrast, if the provider never collected such information in the first place, a court might well hold that there was no duty to do so and that there is no liability for harm caused by administering the medication to which the student was allergic.

Should a program provider gather information about the prior discipline of students who apply to a study abroad program? That information may make it possible for the program provider to anticipate problems that might arise, but it also is likely to expand the provider’s exposure to liability. First, cases often hold

232. *Id.*

233. *Id.* at 363.

234. *Id.*

235. *Id.* at 366.

236. 236 F. Supp. 2d 602 (W.D. Va. 2002). *See also* Nova Se. Univ., Inc. v. Gross, 758 So. 2d 86, 89 (Fla. 2000) (holding that because a university had “control over the students’ conduct by requiring them to do the practicum and by assigning them to a specific location, it also assumed the Hohfeldian correlative duty of acting reasonably in making those assignments”).

237. *Schieszler*, 236 F. Supp. 2d at 609.

238. *Id.*

that when information is collected, the collector has a duty to review the data.²³⁹ Second, if the information that is gathered identifies risks that should be addressed, a court is likely to hold that the failure to do so is negligence. Consequently, it can prudently be urged that unless there is a particular need for personal information relating to program participants, that information should not be solicited.

Information relating to disabilities would seem to be particularly problematic. Once a disability is identified, a program provider will be hard pressed to exclude the student from participation in the program or to deny accommodations. Whether the Americans with Disabilities Act (ADA) applies to educational programs operated at foreign sites has not yet been definitively resolved by the courts.²⁴⁰ However, such a claim is colorable, and a denial of participation or accommodations runs the risk of embroiling a study abroad program in litigation.

VII. MISREPRESENTATION AND BREACH OF FIDUCIARY DUTY

Misrepresentation²⁴¹ claims against colleges and universities are not uncommon.²⁴² Numerous suits against higher education institutions and others

239. Cf. *Waffen v. U.S. Dep't of Health & Human Servs.*, 799 F.2d 911, 913–15 (4th Cir. 1996) (indicating that where an x-ray of the plaintiff was misplaced and never reviewed by doctors, the defendant National Institutes of Health stipulated that it violated the applicable standard of care by its negligence), *abrogated by Hurley v. United States*, 923 F.2d 1091, 1095 n.27 (4th Cir. 1991).

240. See Arlene S. Kanter, *The Presumption Against Extraterritoriality as Applied to Disability Discrimination Laws: Where Does That Leave Students with Disabilities Studying Abroad*, 14 STAN. L. & POL'Y REV. 291, 291 (2003) (“[T]he extent to which the ADA, or its predecessor statute, the Rehabilitation Act, applies extraterritorially to conduct and Americans overseas remains unresolved.”).

241. An action for fraud (sometimes called deceit) offers a remedy for false or misleading statements that are made with “*scienter*”—meaning knowledge of falsity or reckless disregard for the truth. See RESTATEMENT (SECOND) OF TORTS §§ 525–51 (1965) (discussing liability for fraudulent misrepresentation). A parallel action for negligent misrepresentation provides compensation for physical harm or economic losses resulting from carelessly false or misleading statements. See *id.* § 552 (discussing liability for negligent misrepresentation). In addition, state consumer protection laws afford students other remedies for misrepresentations made by colleges and universities. See, e.g., Emily Heffter & Nick Perry, *Student Takes on College and Wins*, SEATTLE TIMES, Feb. 24, 2006, at B1 (discussing a jury verdict which found that a for-profit “college violated the state Consumer Protection Act by failing to tell [a student] that her credits wouldn’t transfer”). In general, the rules on misrepresentation ignore statements that pose little risk of harm because they are unlikely to be relied upon (e.g., vague “puffing,” mere predictions, and personal opinions). See *Maness v. Reese*, 489 S.W.2d 660, 663 (Tex. App. 1972) (“[P]redictions and opinions do not serve as a basis for actionable fraud.”); *Hedin v. Minneapolis Med. & Surgical Inst.*, 64 N.W. 158, 159 (Minn. 1895) (“Generally speaking, . . . mere matters of opinion or conjecture . . . are not actionable.”); *Johnson & Lovorn*, *supra* note 155, at 551–52 (discussing the rule that puffing is permissible). The rules also impose liability for misleading representations which, by reason of the source or circumstances, cause harm to others by inducing misplaced reliance (e.g., misstatements of fact, half-truths, expert opinions, and silence by persons who have a legal duty to speak). *Id.* at 536–54 (discussing outright lies, half-truths, opinions, and silence).

242. See *Harmon v. Sullivan Univ. Sys., Inc.*, No. Civ. A. 03-738-C, 2005 WL 1353752, at *3–6 (W.D. Ky. June 6, 2005) (holding that a claim was stated with respect to fraud and negligent misrepresentation of the accreditation of the university); *Gomes v. Univ. of Me. Sys.*, 365 F.

have been based on alleged misrepresentations concerning the safety of a facility or neighborhood.²⁴³ In the study abroad context, the easiest way to chart a safe course through the thickets of misrepresentation law is to provide information that is accurate and to make disclosures that a student and his or her family would find useful in deciding whether to participate in the program. A provider operating a foreign program should provide students, in a timely manner, with the current U.S. Department of State's Consular Information Sheet for the country in which the program operates, or should advise students to access that information on the web.²⁴⁴ Consular Information Sheets contain data about crime and other dangers faced by American travelers. By ensuring that this information is expressly called to the attention of students, a program provider takes an important step in fending off safety-related misrepresentation claims.

In addition, program representatives should never portray a foreign location as safer than they know it to be. A statement made by a person who lacks the confidence or factual basis that the statement implies is a misrepresentation made with *scienter*.²⁴⁵ If a foreseeable recipient of the statement detrimentally relies upon those false assurances of safety, an action for deceit will lie. The same is true of an intentional half-truth. In a recent case, *Minger v. Green*, the Sixth Circuit held that a cause of action for intentional misrepresentation was stated by the mother of a student who had died in a dormitory fire.²⁴⁶ The complaint alleged that the associate director of the housing office had failed to tell her, in response to her inquiries regarding an earlier fire, of the possibility that the fire had been intentionally set, and had discouraged the mother from contacting the fire department to further investigate the fire.²⁴⁷

Misrepresentation claims have been asserted by students based on statements made in connection with study abroad programs. In *Bird v. Lewis & Clark College*,²⁴⁸ a student alleged, among other claims,²⁴⁹ that a college had committed fraud, negligent misrepresentation, and breach of fiduciary duty by inaccurately

Supp. 2d 6, 47–48 (D. Me. 2005) (discussing a failed claim relating to a disciplinary hearing); *Shelton v. Trs. of Columbia Univ.*, No. 04 Civ. 6714(AKH), 2005 WL 2898237, at *5 (S.D.N.Y. Nov. 1, 2005) (discussing a failed claim relating to a plagiarism hearing).

243. See *Minger v. Green*, 239 F.3d 793, 800 (6th Cir. 2001) (finding that a claim for deceit was stated with respect to misrepresentation of the safety of a dormitory); see, e.g., *O'Hara v. W. Seven Trees Corp. Intercoast Mgmt.*, 142 Cal. Rptr. 487, 491 (Ct. App. 1977) (holding that a complaint was stated for fraud relating to misrepresentation of the safety of an apartment complex).

244. U.S. Dep't of State, Consular Information Sheets, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1765.html (last visited Apr. 25, 2006).

245. See RESTATEMENT (SECOND) OF TORTS § 526 (1965) (providing that a misrepresentation is "fraudulent" if the speaker "(a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies").

246. *Minger*, 239 F.3d at 800.

247. *Id.*

248. 303 F.3d 1015 (9th Cir. 2002).

249. *Id.* at 1019. See *supra* note 22 (listing the various causes of action alleged by the student).

portraying its ability to accommodate her disabilities in its study abroad program in Australia.²⁵⁰ The jury found against the student on all claims, except breach of fiduciary duty, for which it awarded \$5000 in damages.²⁵¹ The Ninth Circuit affirmed, stating:

Although the College contends that it owed no fiduciary duties to Bird, ample evidence exists in the record for the jury to make a contrary finding. The College assured Bird on a number of occasions that the overseas program would accommodate her disability. Darrow [the faculty director of the program] e-mailed Bird's parents and assured them that Global (the company handling the travel arrangements) and Meyers (the director of the College's overseas program) "commonly handle people both in the field and in home stays that are more physically challenged than [Bird]." Darrow also indicated that adequate facilities would be available in most of the outdoor trips.

Bird also had reason to trust Darrow's assurances. Shortly after her injury, the College worked closely with Bird to ensure that she could navigate comfortably around [the home] campus. It installed ramps at her dormitory, changed its inside doors, and remodeled its bathrooms to make them wheelchair-accessible. It even rebuilt parts of the biology labs where she worked. Based on these facts, the jury could have concluded that a "special relationship" developed between the parties. There was no error in allowing that question to go to the jury.²⁵²

Bird is a sobering decision. Read at face value it suggests that any time a college or university complies with demands of the ADA or the Rehabilitation Act at the home campus and assures a student that it can do so at a foreign location,²⁵³ the provider opens itself up to a tort claim²⁵⁴ for breach of fiduciary duty if the accommodations at the foreign site fall short of the student's expectations. It is significant that in *Bird* the Ninth Circuit affirmed the student's breach of fiduciary duty verdict even though it also affirmed jury findings that there was no discrimination on the basis of disability and no violation of the ADA or the Rehabilitation Act.²⁵⁵ In addition, the existence of a fiduciary relationship between a higher education institution and a student triggers heightened

250. *Bird*, 303 F.3d at 1017. "Bird was informed that she could not participate in several activities due to her disability, but that alternative activities would be arranged. Bird was otherwise assured that the program would be able to accommodate her disability." *Id.*

251. *Id.* at 1019.

252. *Id.* at 1023–24.

253. *See id.* at 1017. Although the college contended that Title III and the Rehabilitation Act do not apply extraterritorially to regulate the administration of overseas programs, the court did not reach that issue in view of its denial of equitable relief. *Id.* at 1021 n.1.

254. According to the American Law Institute, breach of fiduciary duty is a tort. *See* RESTATEMENT (SECOND) OF TORTS § 874 (1965) ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.").

255. *Bird*, 303 F.3d at 1019. The Ninth Circuit found that the college "offered ample evidence of having accommodated Bird's disability." *Id.* at 1021.

obligations under the law of misrepresentation.²⁵⁶ A fiduciary is readily held liable for failure to disclose material information to the beneficiary of the relationship, particularly where the interests of the fiduciary and beneficiary are adverse.²⁵⁷ *Bird* means that foreign program providers should exercise considerable caution in the statements they make about being able to accommodate students with disabilities. Otherwise there may be an increased risk of liability both for breach of fiduciary duty and misrepresentation.

VIII. CONCLUSION: WISDOM OF EXPERIENCE

Perhaps the single most important factor in minimizing the risk of legal liability associated with study abroad programs lies in the field of personnel decisions, rather than legal principles. The persons chosen to direct and teach in foreign educational programs must have good judgment, must be willing to work hard, and must have adequate support from colleagues on site to enable the program to succeed. At a foreign study location, there is an endless array of matters—some important, many trivial—that require attention: classroom building access, housing accommodations, travel arrangements, visiting guests, teaching schedules, special events, internet availability, and on and on. If the administrative staff is inexperienced, under-resourced, or not motivated, it is likely that at least some of the issues relating to program participant safety may not be given the attention they deserve.

Continuity of leadership in the administration of a study abroad program can also be a great asset. The “institutional memory” that such persons bring to the enterprise can be the difference between success and failure, or at least between few or no complaints and a merely adequate performance. Past experience at the host site, or even experience with operating foreign programs in other locations, enables those in charge to better anticipate the problems that may arise and to distinguish serious risks from ones that should be accorded less priority. The resources that a program has to succeed—particularly staff time, but also money—must be employed wisely in a manner that optimizes the educational experience (including safety). A foreign program that changes its administration too frequently, that hires persons with little inclination for the endless administrative tasks, or that tries to conduct study abroad programs in too many parts of the globe, may be found trying to surmount the safety learning curve at a moment when action is needed.

Of course, a foreign program is most likely to succeed where the administrative staff and faculty genuinely care about the students. Nothing worse can be said

256. See RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1965) (“One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated . . . matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.”).

257. See generally Vincent R. Johnson, “*Absolute and Perfect Candor*” to Clients, 34 ST. MARY’S L.J. 737, 771 (2003) (discussing the disclosure obligations of attorneys as fiduciaries of clients, and stating that the duties are most extensive “where the interests of the attorney and client are adverse”). See also Johnson, *supra* note 155, at 295–96 (discussing the disclosure obligations of fiduciaries at they relate to database security).

about a study abroad endeavor than that those running it were not interested in the quality of the educational experience and treated the time abroad as a personal vacation with which students should not interfere. The ultimate goal for every foreign educational program must be to provide students with a first-rate educational experience that could not be duplicated in the United States. Students should return to their home campuses stimulated by their foreign classes, enriched by cultural experiences, and better equipped to assume the role of well-educated world citizens.

Like many laudable activities that were once conducted with little thought of civil liability, international education programs must now be operated with due regard for the legal principles that impose a general duty of reasonable care, that punish misrepresentation, and that award compensation for injuries attributable to blameworthy conduct. This is a good development, for it discourages irresponsible practices and creates incentives for safety. The proper response of program providers to the risk of tort liability is neither to withdraw from the market of international education nor to conduct programs with obsessive concern about the threat of litigation. Rather, program providers must simply exercise reasonable care to prevent unnecessary harm to study abroad participants. That is all that the law requires: reasonably prudent conduct.²⁵⁸ Adherence to good practices comporting with that duty will neither seriously harm foreign educational ventures nor waste opportunities for achieving optimal safety in the field of international education. Attention to threats of unnecessary harm can improve the study abroad experience for all concerned.

258. *Cf. Eagleson v. Kent State Univ.*, No. 2001-06304, 2003 WL 21061358, at *3 (Ohio Ct. Cl. May 5, 2003) (holding that a university was not liable for injuries sustained by a conference attendee when a chair collapsed because there was no actual or constructive notice of a defect and the university's method of inspecting chairs twice a year was reasonable).

